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No. 03-

IN THE

Supreme Court of the United States

JOE LEWIS and JUDY LEWIS, as Parents and Guardians of BRANDON D. LEWIS, and BRANDON D. LEWIS, an Individual Florida Resident,

Petitioners,

v.

THE UNITED STATES OF AMERICA, THE UNITED STATES COAST GUARD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Following a scuba diving accident, the United States Coast Guard participated in a search and rescue of Brandon Drew Lewis. The Coast Guard knew it was responding to an injured diver who was unconscious and suffering from the bends. Despite this knowledge and after making the decision to undertake the rescue of Mr. Lewis, the Coast Guard negligently conducted its efforts and failed to render meaningful assistance to Mr. Lewis. Mr. Lewis suffers from permanent paralysis and cognitive deficits as a result. The Court of Appeals relied on the discretionary function exception to government tort liability in affirming a grant of summary judgment in favor of the United States. The Court of Appeals held that the Coast Guard enjoys unbridled discretion in the methods chosen to effectuate the rescue, even after it decided to undertake the rescue and its negligent conduct resulted in enhanced injuries to Mr. Lewis.

This ruling creates a conflict between decisions of this Honorable Court and several United States Circuit Courts of Appeals, which poses the following questions:

Does the discretionary function exception afford absolute immunity to the Coast Guard during search and rescue operations; or is the Coast Guard obligated to use due care once it makes a decision to institute a search and rescue operation and/or render aid to a mariner in distress?

If the Coast Guard is obligated to use due care, does a distressed mariner who detrimentally relies on the Coast Guard under facts that satisfy the Good Samaritan rule, have any remedy against the government agency?

PARTIES TO PROCEEDING

1. Joe Lewis. Individual Florida resident and parent and natural guardian of Brandon Drew; appellant in the court of appeals in No. 02-16450; plaintiff in the district court.

2. Judy Lewis. Individual Florida resident and parent and natural guardian of Brandon Drew; appellant in the court of appeals in No. 02-16450; plaintiff in the district court.

3. Brandon Drew Lewis. Individual Florida resident; appellant in the court of appeals in No. 02-16450; plaintiff in the district court.

4. United States of America, United States Coast Guard. Appellee in the court of appeals in No. 02-16450; defendant in the district court.

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The petitioners, Joe Lewis, Judy Lewis and Brandon Drew Lewis, pray that the Supreme Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals, No. 02-16450, is not formally reported. It is attached as Appendix A. The order denying the petition for rehearing or rehearing en banc is unpublished. It is attached as Appendix C. The ruling of the United States District Court for the Middle District of Florida, Jacksonville division, is likewise unpublished. The district court's ruling is attached as Appendix B.

STATEMENT OF JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals was entered on November 20, 2003. An order of the Court of Appeals denying a timely petition for rehearing and petition for rehearing en banc was entered on March 12, 2004. (Pet. App. C).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Article VI, Clause 2

> This Constitution, and the Laws of the United States, which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under

the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Title 14 United States Code, Section 88
Saving life and property

(a) In order to render aid to distressed persons, vessels, and aircraft on and under the high seas and on and under the waters over which the United States has jurisdiction and in order to render aid to persons and property imperiled by flood, the Coast Guard may:

> (1) perform any and all acts necessary to rescue and aid persons and protect and save property; * * *

Title 28 United States Code, Section 2680 Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to –

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused. * * *

**Title 46 United States Code,
Section 742 Libel In Personam**

> In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States or any corporation mentioned in section 741 of this title. * * *

Title 46 United States Code Appendix, Section 781 Libel in admiralty against or impleader of the United States

> A libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: Provided, That the cause of action arose after the 6th day of April, 1920.

STATEMENT

The admiralty jurisdiction of the district court was invoked under 28 U.S.C § 1333.

Following a scuba diving accident approximately twenty-eight miles off the coast of Mayport, Florida, Brandon Drew Lewis was rendered unconscious by a condition known as the bends. Members of the Lewis vessel's party immediately notified the Group Mayport Coast Guard station that Mr. Lewis was an

injured diver suffering from the bends. The Coast Guard search and rescue coordinator understood the life-threatening severity of the situation and knew that providing a "bent" diver with oxygen and fluids was imperative. Armed with this knowledge, the Coast Guard made the decision to undertake the search and rescue of Mr. Lewis.

Once the decision to undertake the rescue was made, the Coast Guard dispatched a 41 foot boat to rendezvous with the Lewis vessel. However, the Coast Guard crew was neither trained nor cognizant as to how to respond to an injured diver such as Mr. Lewis. Mr. Lewis was transported to the Coast Guard vessel at sea from the faster Lewis vessel and eventually carried to shore. En route, the Coast Guard failed to provide any oxygen, fluids or any benefit to Mr. Lewis. In fact, the Coast Guard crew testified they would not have administered oxygen to Mr. Lewis even if they knew he would die without it.

The importance of immediate oxygen administration to an injured diver is well-known and undisputed. Timely receipt of care can eliminate the symptoms of the bends and prevent neurological injury. The transfer of Mr. Lewis to the Coast Guard vessel exhausted valuable time and made no sense.

In fact, the sole reason Mr. Lewis was transferred to the Coast Guard vessel was the well-founded belief by Mr. Lewis' brother that he would receive immediate, appropriate care. This reliance cost Mr. Lewis dearly. According to his treating physician, Mr. Lewis would have recovered from his injuries with little or no permanent impairment if he had been given oxygen by the Coast Guard.

The Coast Guard engendered reliance on its search and rescue expertise to the eventual and permanent detriment of

Mr. Lewis. Instead of exercising its discretion by declining to undertake the Lewis search and rescue, the Coast Guard dispatched an untrained crew that never had any intention of providing fluids, oxygen or any benefit whatsoever for his condition. Despite clear weather, the Coast Guard failed to utilize all available means to ensure an appropriate search and rescue was conducted. This decision was made, in part, because the 41 foot boat provided estimated times of arrival that were inaccurate by nearly one-hundred percent – each way. The Coast Guard should have simply declined the search and rescue and allowed the Lewis vessel to transport Mr. Lewis more quickly to shore.

The petitioners sued the United States for the personal injuries suffered by Brandon Drew Lewis alleging that the Coast Guard failed to exercise reasonable care during the search and rescue to Mr. Lewis' detriment. Coast Guard personnel testified that they knew they were responding to an injured diver with the bends, which they knew was a life-threatening condition. However, Coast Guard personnel intentionally did not take any oxygen and intentionally did not provide Mr. Lewis with any fluids.

Both parties moved for summary judgment. The government moved for summary judgment, claiming the Coast Guard's actions during the search and rescue were discretionary.[1] It argued the discretionary function exception of the Federal Torts Claims Act, as implied into the Suits in Admiralty Act and the Public Vessels Act, preserved the government's sovereign immunity as no federal statute,

1. The government actually filed a second Rule 12 motion to dismiss identical to its initial motion to dismiss, which was previously denied by the district court. The district court converted the second Rule 12 motion to a Rule 56 motion for summary judgment.

regulation or policy manual provided specific mandates for the Coast Guard's conduct at issue. The district court granted summary judgment in favor of the government, finding that the discretionary function exception applied to Coast Guard decisions regarding how to proceed with the search and rescue of Mr. Lewis, which effectively abolished the duty to use due care. Pet. App. 13a-14a.

In affirming the district court's grant of summary judgment, the Court of Appeals failed to address controlling search and rescue precedent holding that the discretionary function exception applies solely to the Coast Guard's decision to undertake a search and rescue. Instead, it established a broad rule of immunity by finding:

> The decision to undertake the rescue extends not only to the decision to rescue, but also to the methods chosen by the Coast Guard to effectuate the rescue.

Pet. App. 3a.

REASONS FOR GRANTING THE PETITION

The Court of Appeals decision overturns nearly fifty years of jurisprudence. Its opinion directly conflicts with the decisions of the United States Supreme Court and the United States Courts of Appeals for the First, Fourth, Fifth, Sixth, and Ninth Circuit.

Has the Eleventh Circuit's interpretation of the discretionary function exception of the Federal Tort Claims Act eviscerated the plain language of the Suits in Admiralty Act and Public Vessels Act?

Petitioners rely on long-standing precedent which affords jurisdiction in instances where the Coast Guard fails to act with reasonable care after it exercises its discretion to undertake a search and rescue. This law applies specifically where the rescue involves a person with known diving-related injuries and in a life-threatening condition under circumstances in which the decision to undertake the rescue engenders reliance on the Coast Guard. Here, the Coast Guard made the decision to undertake the rescue with full-knowledge of the type and severity of Drew Lewis' condition. Despite that knowledge, the Coast Guard dispatched a boat with an untrained and ill-prepared crew. The circumstances known to the Coast Guard at the time it exercised its discretion to undertake the "rescue" required a specific course of conduct. Essentially, the Coast Guard provided a water taxi, which was relied upon by the Lewis vessel to the detriment of Brandon Drew Lewis. The Coast Guard's actions (and omissions) render the United States amenable to suit and liable for its negligence.

The undisputed evidence shows that the Divers Alert Network (DAN) (headquartered at Duke University, Raleigh, North Carolina) offered the entire Coast Guard free instruction on the administration of oxygen to injured divers. No later than three years before Mr. Lewis' accident, the Coast Guard Commandant made a policy decision and issued a directive that all Coast Guard first responders be trained pursuant to the DAN program. Even though the Coast Guard Commandant directed that DAN materials be distributed to all Coast Guard first responders in Group Mayport, this training was only conducted in a few locations in Group Mayport's district. The Commander's directive establishes Coast Guard policy. This policy was ignored at the Coast Guard station at issue and culminated in the Coast Guard exercising its discretion to undertake the rescue of a known diver in distress with serious

life-threatening injuries. The search and rescue permanently worsened Mr. Lewis' injuries.

If the Court of Appeals' decision is allowed to stand, the primary purpose of the Coast Guard and all those who rely on its expertise are in dire jeopardy. The Coast Guard's decision to rescue Mr. Lewis, fully aware of the severity and life-threatening nature of his diving injuries, required the exercise of due care. To find the government enjoys absolute sovereign immunity for all actions under the guise of the discretionary function exception would allow the Coast Guard to continue to hold itself out as a marine rescue expert, engender reliance from distressed mariners, and then fail to act with due care to the detriment of those in distress.[2]

The decision below conflicts with well-established principles of maritime jurisprudence and government tort liability. The legal principle stated by the Eleventh Circuit has no application to a Coast Guard search and rescue mission. If allowed to stand, distressed mariners who are negligently harmed will be stripped of their statutory remedies against the Coast Guard. Moreover and regardless of the gravity of the negligence, the ruling will virtually eliminate Coast Guard responsibility in all distress-at-sea cases.

Contrary to the statutory language of the Suits in Admiralty Act, Public Vessels Act, the Federal Tort Claims Act, and the Congressional purposes of those Acts, the Eleventh Circuit's decision represents a fundamental shift in Coast Guard responsibility and liability. In fact, the Eleventh Circuit's opinion

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2. The summary judgment record included testimony from all Coast Guard personnel that their primary and most important responsibility was to save the lives of those in distress at sea.

fails to recognize that the discretionary function exception only affords the Coast Guard sovereign immunity for the decision of *whether* to undertake a search and rescue. The Court of Appeals has established a bright-line rule of blanket immunity for all Coast Guard actions and never addresses the cornerstone principle that the Coast Guard is held to the same standard as a private party once it exercises its discretion to undertake a search and rescue.

As the grant of summary judgment threatens widespread misinterpretation and misapplication of controlling federal statutes, petitioners pray this Court to grant review of the Eleventh Circuit's decision. Mariners nationwide are entitled to the protections afforded by long-standing United States Supreme Court and other Circuit Court of Appeals precedent. They should not be deprived of their statutory rights against negligent government actors like the Coast Guard in this instance.

I. THE ELEVENTH CIRCUIT HAS FUNDAMENTALLY ELIMINATED GOVERNMENT TORT LIABILITY

In the present case, the Eleventh Circuit concluded:

> The discretion to undertake the rescue extends not only to the decision to rescue, but also to the methods chosen by the Coast Guard to effectuate the rescue.

Pet. App. 3a.[3]

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3. The Eleventh Circuit's holding cites only to the federal witness protection case of *Ochran v. United States*, 117 F.3d 495, 506 (11th Cir. 1997).

The Eleventh Circuit has adopted a rule of law which affords the United States Coast Guard, if not all governmental agencies, unbridled immunity from tort liability. Finding that the discretionary function exception precluded Coast Guard liability as a matter of law, the Eleventh Circuit has misinterpreted important Congressional mandates and aspects of governmental tort liability.

The decision is in direct conflict with this Honorable Court's decisions, as well as numerous decisions of the First, Fourth, Fifth, Sixth and Ninth Circuits. This case merits review to determine whether a governmental actor or agency can ever be subject to tort liability.

A. The Eleventh Circuit's Statutory Interpretation Violates Nearly Fifty Years of Government Maritime Jurisprudence

Since this Court's decision in *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), the government has been held liable for negligent, detrimental conduct. The discretionary function exception, 28 U.S.C. § 2680(a), does not obviate a government agency's responsibility to act with reasonable care as the government is treated just as a private party. *See* 28 U.S.C. § 1346(b) and § 2674; *Indian Towing*, 350 U.S. at 68-9; *Rayonier, Inc. v. United States*, 352 U.S. 315, 319 (1957). The imposition of the maritime Good Samaritan standard – whereby a rescuer (whether a government actor or private volunteer) is only liable if the rescuer's conduct makes the victim worse off – serves as an additional safeguard against government tort liability. *See* Restatement (Second) of Torts 323 and § 324A. It is the appropriate measure of liability once a government

rescuer has exercised its discretion to act and then fails to act with due care. *Indian Towing* held:

> The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chadeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care. . . . If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act.

Indian Towing, 350 U.S. at 69.

Contrary to this Court's treatment of *Indian Towing* as part of discretionary function exception law, the Eleventh Circuit never addressed *Indian Towing*'s teachings. Similarly, the Circuit Court never addressed the question of governmental liability for distress-at-sea cases. Despite the panel decision's finding that Mr. Lewis' "injuries were exacerbated by the delay in providing him emergency treatment following the accident" (Pet. App. 2a.), the Circuit Court disregarded its significance in the circumstances of this case. This means that even in cases where the Good Samaritan rule is satisfied, Coast Guard conduct is unreviewable. The panel decision not only eliminates review of Coast Guard search and rescue conduct but also abrogates the application of the Good Samaritan standard.

Did Congress really intend to prevent review of cases where a distressed mariner sought and relied upon the rescue expertise of the Coast Guard, which then subjected him to negligent conduct that "exacerbated" his injuries? The answer from this Court must be "No."

The discretionary function exception is properly used to prevent judicial second guessing where a government actor's conduct involves an element of judgment or choice *and* that conduct involves the permissible exercise of regulatory policy judgment. *See United States v. Gaubert*, 499 U.S. 315, 322 (1991); *Berkovitz v. United States*, 486 U.S. at 536-37. *Berkovitz* and *Gaubert* affirm *Indian Towing*, and this Court has never strayed from the line of cases finding Coast Guard responsibility under these circumstances.

By granting unlimited discretion to the Coast Guard throughout search and rescue operations, the Eleventh Circuit ignores the synthesis of *Indian Towing* as explained in *Gaubert* and *Berkovitz*. and defies this Court's repeated adoption of *Indian Towing*'s Good Samaritan rule.

This case does not involve the decision as to whether the government should take over a bank (*Berkovitz*), approve and distribute a medical vaccine (*Gaubert*) or protect a witness (*Ochran*). The Coast Guard's initial decision of whether to respond to a distress-at-sea is rooted on considerations of regulatory public policy. However, once the response is undertaken, the Coast Guard does not act with any hope of reward in fulfilling its mission to save lives and is obligated to exercise reasonable care. *United States v. Gavagan*, 280 F.2d 319, 326-28 (5th Cir. 1960); *see Indian Towing*, 350 U.S. at 69; *Sagan v. United States*, 342 F.3d 493 (6th Cir. 2003); *Hurd v. United States*, 134 F.Supp. 2d 745 (D. S.C. 2001), *aff'd*, 34 Fed.Appx. 77, 2002 AMC 1584, 2002 WL 7300284 (4th Cir. 2002) (unpublished); *Huber v. United States*, 838 F.2d 398 (9th Cir. 1988); *United States v. Sandra & Dennis Fishing Corp.*, 372 F.2d 189 (1st Cir. 1967); *United States v. Devane*, 306 F.2d 182 (5th Cir. 1962).

As in every other distress-at-sea case, this case does not involve any choices of a policymaking nature. This case is analogous to *Indian Towing*'s reasoning as interpreted by this Court, the Circuit Courts of Appeals and district courts reviewing Coast Guard actions while conducting a search and rescue.

This Court has repeatedly held the essence of maritime jurisprudence is governed by the principle of uniformity in the application of admiralty law. *American Dredging Co. v. Miller*, 510 U.S. 443, 451 (1994) (J. Scalia); *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 401 (1970) (J. Harlan); *The Lottawanna*, 88 U.S. 558, 575 (1874). The Eleventh Circuit ruling violates this principle and invites haphazard and incongruous results. These results are unacceptable, particularly in the search and rescue context.

This case merits Supreme Court review to dispel the Eleventh Circuit's erroneous interpretation that the discretionary function exception shields all governmental agencies from liability. The decision ignores the true test for government responsibility and liability in a search and rescue context.

The First, Fourth, Fifth, Sixth and Ninth Circuit Courts of Appeals correctly discern the Coast Guard's duty to act with due care. These Circuits hold that the Coast Guard must exercise reasonable care once it undertakes a rescue, and failing to do so, subjects it, like any other governmental agency, to liability in accordance with the Good Samaritan rule. *See Sagan v. United States*, 342 F.3d 493 (6th Cir. 2003); *Hurd v. United States*, 134 F. Supp.2d 745 (D. S.C. 2001), *aff'd*, 34 Fed.Appx. 77, 2002 AMC 1584, 2002 WL 7300284 (4th Cir. 2002) (unpublished); *Huber v. United States*, 838 F.2d 398 (9th Cir. 1988); *United States v. Gavagan*, 280 F.2d 319 (5th Cir. 1960); *United States v. Sandra & Dennis Fishing Corp.*, 372 F.2d 189 (1st Cir. 1967);

United States v. Devane, 306 F.2d 182 (5th Cir. 1962); *see also Daley v. United States*, 499 F. Supp. 1005, 1009-10 (D. Mass. 1980); *Lacey v. United States*, 98 F. Supp. 219 (D. Mass. 1951); *contra*, *Northern Voyager LP v. Thames Shipyard & Repair Co.*, 350 F.3d 247 (1st Cir. 2003).

Given the Eleventh Circuit's decision here, distressed mariners who rely on the expertise of the Coast Guard to their detriment are without recourse. *But see Indian Towing*, 350 U.S. at 68 ("The broad and just purpose which the [FTCA] was designed to effect was to compensate the victims of negligence in the conduct of governmental entities in circumstances like unto those in which a private person would be liable. . . ."). The decision for review creates confusion by holding all Coast Guard activities conducted under authority granted by 14 U.S.C. § 88 are unequivocally protected by the discretionary function exception.

This petition merits review to reaffirm and uphold the well-founded jurisprudence set forth in *Indian Towing* and its progeny cited above, finding that a government agency can be held liable for actions that occur after a course of action is chosen where those actions satisfy the Good Samaritan criteria. There is no discretion to act negligently during a search and rescue – neither for a private party nor the Coast Guard.

B. The Eleventh Circuit Has Violated the Separation of Powers Doctrine and the Supremacy Clause – The Exception Swallows the Rule

Congress has granted distressed mariners an express remedy against negligent government agencies. The Suits in Admiralty Act, 46 U.S.C. §§ 741-752, and the Public Vessels Act, 46 U.S.C. App. §§ 781-790, are remedial statutes which contain

broad waivers of sovereign immunity for acts of government negligence. This right of remedy applies, in particular, to distress-at-sea cases.

The general rule is that injured parties can maintain a cause of action for damages negligently caused by the Coast Guard. *See Indian Towing Co. v. United States*, 350 U.S. 61 (1955); *Sagan v. United States*, 342 F.3d 493 (6th Cir. 2003); *Hurd v. United States*, 134 F. Supp.2d 745 (D. S.C. 2001), *aff'd*, 34 Fed.Appx. 77, 2002 AMC 1584, 2002 WL 7300284 (4th Cir. 2002) (unpublished); *Rodrigue v. United States*, 968 F.2d 1430 (1st Cir. 1992); *Huber v. United States*, 838 F.2d 398 (9th Cir. 1988); *United States v. Gavagan*, 280 F.2d 319 (5th Cir. 1960); *United States v. Sandra & Dennis Fishing Corp.*, 372 F.2d 189 (1st Cir. 1967); *United States v. Devane*, 306 F.2d 182 (5th Cir. 1962); *see also*, *Daley v. United States*, 499 F.Supp. 1005, 1009-10 (D. Mass. 1980); *Lacey v. United States*, 98 F. Supp. 219 (D. Mass. 1951)

While neither statute expressly provides an exception to the sovereign immunity waivers, such exception from the Federal Tort Claims Act, 28 U.S.C. § 2680(a), has been consistently implied into these acts. *See, e.g., United States Fire Ins. Co. v. United States*, 806 F.2d 1529, 1534-35 (11th Cir. 1986). The discretionary function exception creates, by its very nomenclature, a caveat to the general rule of these remedial statutes and operates as a limited revocation of the Acts' waivers of sovereign immunity. While courts have varied in applying the narrow exception to this rule, they have always stayed within the channel. However, the Eleventh Circuit has clearly steered out of the channel and run aground. Such a course is forbidden by Congress and this Honorable Court.

In applying the discretionary function exception to the Coast Guard's actions, the Eleventh Circuit adopted a rule that

contravenes the exception's plain statutory language as well as the Congressional purpose of the Federal Tort Claims Act. The discretionary function exception only applies to government actors "exercising due care." 28 U.S.C. § 2680(a). Thus, the Eleventh Circuit's decision, which neither addresses the degree of care exercised by the Coast Guard nor the propriety of applying the discretionary function exception once a Coast Guard search and rescue mission is undertaken, has misinterpreted and/or overlooked the applicable statutory language.

The Eleventh Circuit's opinion affirming the district court's grant of summary judgment creates a rule with the potential for unfettered application. This rule destabilizes this Court's stated purpose to the Federal Tort Claims Act and flies in the face of the broad and remedial purpose of these Acts which waive sovereign immunity.[4] *See Indian Towing*, 350 U.S. at 68-69; *O'Toole v. United States*, 295 F.3d 1029, 1037 (9th Cir. 2002); *Kielwien v. United States*, 540 F.2d 676, 681 (4th Cir. 1976). The exception is not and never was intended to become the rule. The Circuit Court has adopted an exception in favor of the rule in a forbidden exercise of judicial legislation.

In distress-at-sea cases, courts have uniformly found the Coast Guard amenable to suit where the facts satisfied the maritime Good Samaritan rule – despite the government's attempts to raise the discretionary function exception. *See, e.g., Gavagan*, 280 F.2d at 328; *Huber*, 838 F.2d at 400-01; *Hurd*, 134 F. Supp.2d at 769. The discretionary function exception does not preclude the Coast Guard's duty to act with reasonable care after exercising its discretion and deciding to engage in a rescue of a distressed mariner.

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4. Now, the Eleventh Circuit destabilizes claims brought under the Suits in Admiralty Act and Public Vessels Act.

The Eleventh Circuit's decision shelters all governmental action under the immunity of the discretionary function exception. Further, the Eleventh Circuit's statutory interpretation conflicts with a large body of controlling and persuasive law which, if allowed to stand, threatens the Supremacy Clause[5] and the Separation of Powers Doctrine by permitting the judiciary to eliminate the plain language and Congressional intent of the remedial Acts at issue.

The Eleventh Circuit has decreed that government agencies are immune to the checks and balances of the judiciary. Its ruling catapults the discretionary function exception beyond its limitations. Under its reasoning, Congress' directives will be swallowed by the judiciary as negligent government actors may never be amenable to suit.

Decisions such as *Gavagan*, *DeVane*, *Hurd*, *Huber*, *Sandra & Dennis Fishing Co.*, hold that once the Coast Guard exercises its discretion to render aid to a distressed mariner, it is obligated to use due care. *See also*, *Indian Towing*, 350 U.S. at 69. At odds with these teachings, the Eleventh Circuit has joined the First Circuit in rewriting government tort liability legislation. *See Northern Voyager LP v. Thames Shipyard & Repair Co.*, 350 F.3d 247 (1st Cir. 2003). Coast Guard liability for negligent acts or omissions was, until very recently, the rule of law not only in the Eleventh Circuit but nationwide.[6] The destabilizing consequences of the Circuit Court's opinion and the conflicts created by its ruling will threaten all aspects of Congressional

5. U.S. Const., Article VI, Clause 2.

6. The Eleventh Circuit panel is bound by decisions of the prior Fifth Circuit (panel or en banc) absent a decision from the Eleventh Circuit sitting en banc. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

enactments waiving sovereign immunity for governmental tort liability.

In granting the Coast Guard unbridled discretion after it affirmatively chooses to assist a distressed mariner, the Eleventh Circuit stands alone with the recent decision from the First Circuit.[7] These decisions jeopardize the precepts of uniformity in maritime law. This dangerous trend of confusion and misinterpretation between the Circuits in failing to follow the appropriate law demonstrates the importance of this Honorable Court's review.

Absent review, this decision is tantamount to exonerating government liability in all search and rescue missions. This ruling countermands years of distress-at-sea cases and dictates that negligent government actors, like the Coast Guard, are free of liability – in spite of the Good Samaritan rule. Pet. App. 2a-4a. In effect, the Eleventh Circuit now holds that *all* Coast Guard actions are beyond the purview of the judiciary. No matter how repugnant the conduct, distressed mariners will be deprived of an express legislative remedy.

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7. Recently, the First Circuit has also adopted the idea of wholesale immunity for Coast Guard conduct. *Northern Voyager LP*, *supra*. The Eleventh Circuit and First Circuit stand at odds with well-settled jurisprudence, requiring the granting of this Petition to resolve the dangerous conflict among the Circuits.

II. THE ELEVENTH CIRCUIT'S OPINION GRANTING SOVEREIGN IMMUNITY TO COAST GUARD ACTIONS ONCE IT UNDERTAKES A RESCUE DIRECTLY CONFLICTS WITH ITS OWN CONTROLLING AUTHORITY AND NUMEROUS COAST GUARD DECISIONS FROM OTHER CIRCUITS

A. Eleventh Circuit Violates Its Own Controlling Authority

Neither the Eleventh Circuit's opinion affirming the district court's grant of summary judgment nor the district court's decision discuss two controlling decisions within the Eleventh Circuit. Both *United States v. Gavagan*, 280 F.2d 319 (5th Cir. 1960) and *United States v. DeVane*, 306 F.2d 182 (5th Cir. 1962) are Coast Guard search and rescue cases in which the discretionary function exception was rejected.[8] Relying on *Indian Towing*, the Fifth Circuit held the Coast Guard liable for negligently conducted search and rescue operations. *Gavagan*, 280 F.2d at 328-329. This finding hinged on the evidence demonstrating the Coast Guard failed to exercise reasonable care in conducting the rescue and "worsened" the victim's position after the decision to undertake the rescue was made. *Devane* reiterated the Fifth Circuit's interpretation of *Indian Towing* and the Federal Tort Claims Act.

In the instant case, the district court never addressed these two controlling and analogous decisions. The district court's analysis of the discretionary function exception and presumably

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8. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (the newly created Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit rendered prior to October 1, 1981); *see* footnote 5, *supra*.

14 U.S.C. § 88, examined only one Coast Guard search and rescue case. Citing the decision of *Northern Voyager LP v. Thames Shipyard & Repair Co.*, 214 F. Supp.2d 47 (D. Mass. 2002)[9], the district court found *all* Coast Guard actions as to how to conduct the search and rescue of Mr. Lewis (even after it had made the decision to undertake the rescue) were discretionary in nature and, thus, "protected by the discretionary function exception." Pet. App. 13a-14a.

The rule that the Coast Guard must act with reasonable care once it makes the affirmative discretionary decision to undertake a search and rescue has been a cornerstone of the Fifth and Eleventh Circuit's jurisprudence for over forty years.

However, neither the district court nor the Eleventh Circuit considered *Gavagan* or *DeVane*. Instead, the Eleventh Circuit relied exclusively upon its own interpretation of the discretionary function exception in a Federal Tort Claims Act witness protection case. Pet. App. 3a. While the holding in *Ochran v. United States*, 117 F.3d 495 (11th Cir. 1997) is questionable on its face, it has no application to the present case involving a Coast Guard search and rescue, particularly where *Gavagan* and *DeVane* demand a different result.

As the Eleventh Circuit's panel decision contravenes this Honorable Court, other Circuit Courts of Appeals as well as its own controlling authority, the petition clearly merits review. The discretionary function exception was never intended to

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9. *Aff'd in part, vacated in part, remanded by*, 350 F.3d 247 (1st Cir. 2003). As this decision is also at odds with controlling jurisprudence, Northern Voyager LP has recently filed a Petition for Writ of Certiorari with this Court. Petitioners would state that the confusion between the Circuits further demonstrates the need for Supreme Court review of this important question with far-reaching ramifications.

provide complete immunity to all Coast Guard actions carried out pursuant to 14 U.S.C. § 88. However, the Circuit Court panel has created a new rule of law, impliedly overruling its own controlling precedent and *Indian Towing*, in which all governmental actions have become discretionary in nature so that the discretionary function exception arguably eliminates government tort liability. Undoubtedly, the decision eliminates Coast Guard responsibility in the Eleventh Circuit.

B. A Split Exists Between the Circuit Courts of Appeals Concerning the Interpretation and Application of the Discretionary Function Exception in Coast Guard Search and Rescue Decisions

By granting the Coast Guard wholesale discretion and immunity from liability, the Eleventh Circuit is now at odds with the First, Fourth, Fifth, Sixth and Ninth Circuit Courts of Appeals.

Sandra & Dennis Fishing Corp., *Hurd*, *Gavagan*, *Devane*, *Sagan*, and *Huber* each hold that while the Coast Guard enjoys absolute discretion to decide to undertake a search and rescue, once it exercises that discretion and makes the decision to institute a distress-at-sea rescue operation, it must act with reasonable care. *See Sandra & Dennis Fishing Corp.*, 372 F.2d at 195-97; *Hurd*, 34 Fed.Appx. at 83 (unpublished), *affirming* 134 F. Supp.2d at 768-69; *Gavagan*, 280 F.2d at 328; *DeVane*, 306 F.2d at 186; *Sagan*, 342 F.3d at 498; *Huber*, 838 F.2d at 400-01.

In contrast, the Eleventh Circuit decision in this case means that the Coast Guard is not held to any standard of care once it exercises its discretion to undertake a search and rescue: "The discretion to undertake the rescue extends not only to the

decision to rescue, but also to the methods chosen by the Coast Guard to effectuate the rescue." Pet. App. 3a. The Court also found the discretionary function exception applied because the applicable Coast Guard manuals contained discretionary, not mandatory, language. Pet. App. 3a.

This rule of law directly conflicts with the Circuit Courts above. Through the judicial expansion of the discretionary function exception to include all aspects of a Coast Guard search and rescue, the Eleventh Circuit has split with the vast majority of Circuit Courts of Appeals that have decided this question. The allowance of a writ of certiorari will allow this Honorable Court to resolve the conflict among the Circuits.

III. THIS COURT SHOULD REFUSE TO ADOPT THE ELEVENTH CIRCUIT'S SEARCH AND RESCUE MOTTO – *SEMPER PARATUS, INTERDUM PRUDENS* [10]

Coast Guard personnel have testified in accordance with Coast Guard manuals that saving lives is the Coast Guard's most important mission. However, the Eleventh Circuit's rule undermines this paramount mission. By interpreting 14 U.S.C. § 88 as affording the Coast Guard absolute discretion and immunity for all acts and omissions during a distress-at-sea operation, the Eleventh Circuit has adopted a maxim denounced by the First Circuit over three decades ago. *United States v. Sandra & Dennis Fishing Corp.*, 372 F.2d at 197; *but see* footnotes, 6 & 8, *supra*.

"Always Ready, Sometimes Careful" creates a dangerous precedent for distressed mariners and conflicts with the desired Congressional result in enacting 14 U.S.C. § 88, the Suits in

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10. "Always Ready, Sometimes Careful"

Admiralty Act, the Public Vessels Act and the Federal Tort Claims Act. Exonerating Coast Guard responsibility for negligent conduct which enhanced a distressed diver's injuries is contrary to the whole jurisprudence of distress-at-sea cases.

This motto is particularly offensive in the instant case because of the Coast Guard's prior knowledge and mandates directing the subject Coast Guard station to properly conduct a search and rescue of an injured diver, the Coast Guard's failure to utilize all available resources, the Lewis vessel's detrimental reliance on Coast Guard rescue expertise, and the resulting enhancement of Mr. Lewis' injuries. *See* Pet. App. 2a.

The Eleventh Circuit has now drifted afoul in deciding Coast Guard responsibility in distress-at-sea cases. Congressional mandates and a whole body of maritime jurisprudence will be turned on their heads unless this petition is granted. The discretionary function exception has now overtaken the express waiver of sovereign immunity as well as general principles of admiralty law. As demonstrated by the recent pronouncements of the First and Eleventh Circuits, the split among the Circuit Courts creates a conflict of significant importance.

The petition should be granted to resolve the conflicts among the Circuits and with this Court's decisions. As noted by this Court, the Circuit Courts have had difficulty interpreting the appropriate scope of the discretionary function exception. *Gaubert*, 499 U.S. at 335-37. (J. Scalia, concurring in part). This confusion has resulted in the misplaced expansion of this narrow exception and changed the entire arena of government tort liability.

CONCLUSION

For the reasons set forth above, the petitioners respectfully request that the petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED NOVEMBER 20, 2003

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 02-16450

D.C. Docket No. 01-00821-CV-3-J-25TEM

JOE LEWIS, as parent and guardian of Brandon D. Lewis, JUDY LEWIS, as parent and guardian of Brandon D. Lewis, BRANDON D. LEWIS, an individual Florida resident,

Plaintiffs-Appellants,

versus

UNITED STATES OF AMERICA, U.S. COAST GUARD,

Defendants-Appellees.

Appeal from the United States District Court for the Middle District of Florida

(November 20, 2003)

Before BLACK, HULL and COX, Circuit Judges.

PER CURIAM:

Joe Lewis, Judy Lewis, and Brandon Lewis ("Appellants") appeal the district court's grant of summary

judgment to the United States and United States Coast Guard. Brandon Lewis developed the "bends" while scuba diving off the coast of Jacksonville, Florida. Tragically, it seems clear that his injuries were exacerbated by the delay in providing him emergency treatment following the accident. The Appellants filed this tort action against the United States, alleging that the negligence of the Coast Guard in the conduct of the rescue caused the delay in treatment. The district court determined that the discretionary function exception applied, and thus, that the United States had not waived its immunity from suit.

The Appellants raise three issues on appeal, contending that: (1) the district court erroneously determined that the United States had not waived its sovereign immunity because the "discretionary function exception" applied; (2) genuine, disputed issues of material fact existed, making summary judgment inappropriate; and (3) the district court failed to properly address the Appellants' motion for summary judgment.

We review de novo the district court's conclusion that it was without subject matter jurisdiction. *Mid-South Holding Co. v. United States,* 225 F.3d 1201, 1204 (11th Cir. 2000). We review de novo the district court's order granting summary judgment. *Burton v. City of Belle Glade,* 178 F.3d 1175, 1186-87 (11th Cir. 1999).

The discretionary function exception, codified in the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq,* preserves the United States's sovereign immunity against "[a]ny claim . . . based upon the exercise or performance or the failure to

exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). In *United States v. Gaubert,* 499 U.S. 315, 111 S. Ct. 1267 (1991), the Supreme Court articulated a two-part test to guide courts on the application of the discretionary function exception. The exception applies only (1) when the relevant conduct involves an element of judgment or choice on the part of the government actor, and (2) when the conduct involves considerations of public policy. *Id.* at 322-23, 111 S. Ct. 1273-74.

The Appellants contend that the only discretion that the Coast Guard could exercise was in the affirmative decision to rescue Brandon Lewis, and that once the rescue began, the Coast Guard was bound to act with reasonable care. The Appellants argue that, during the rescue, the Coast Guard did not follow mandatory and non-discretionary language contained in the Search and Rescue (SAR) Manual and the Coast Guard Addendum to the SAR Manual.

We disagree. The discretion to undertake the rescue extends not only to the decision to rescue, but also to the methods chosen by the Coast Guard to effectuate the rescue. *See Ochran v. United* States, 117 F.3d 495, 506 (11th Cir. 1997) (holding that any alleged negligence in protecting a witness was not actionable because deciding how to protect a witness involves the "exercise of policy judgment" within the purview of the discretionary function exception.) Furthermore, the language cited by the Appellants in the applicable manuals is discretionary and not mandatory.

Appendix A

As to the Appellants' argument that disputed questions of material fact precluded the grant of summary judgment, we conclude that the district court's determination that the discretionary function exception applied did not require the resolution of any disputed issues of material fact. Thus, the district court properly concluded that it lacked subject matter jurisdiction. This determination precluded consideration of the merits of the Appellants' motion for summary judgment.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, JACKSONVILLE DIVISION FILED NOVEMBER 5, 2002

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION
IN ADMIRALTY

CASE. NO. 3:01-cv-821-J-25TEM

JOE LEWIS and JUDY LEWIS, as parents and guardians of BRANDON D. LEWIS, and BRANDON D. LEWIS, an individual Florida resident,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA, and THE UNITED STATES COAST GUARD,

Defendants.

ORDER

THIS CAUSE is before the Court on the Government's Motion to Dismiss (Dkt. 32), which was converted to a summary judgment motion (hereinafter, "Converted Motion for Summary Judgment"), Plaintiffs' Motion for Summary Judgment, the parties' responses thereto, and the Government's reply memoranda. Upon consideration of same and being otherwise advised of the record herein, the Court finds as follows:

Appendix B

On February 13, 2000, while Brandon Lewis was scuba diving off the coast of Jacksonville, Florida, he had a diving accident. The United States Coast Guard ("the Coast Guard") rescued and transported Brandon Lewis to a medical facility aboard CG 41428. Plaintiffs sue the United States, under the Suits in Admiralty Act ("SAA"), 46 U.S.C. App. § 741 *et seq.*, for the Coast Guard's purported negligence in its rescue of Brandon Lewis. The Government in its Converted Motion for Summary Judgment seeks dismissal of this lawsuit, claiming that it is immune from suit under the discretionary function exception.

The discretionary function exception applies to claims arising under the SAA.[1] Pursuant to the discretionary function exception, the Government is not liable for "[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the

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1. "[T]he SAA implicitly contains a "discretionary function exception" to the United States' waiver of sovereign immunity, on the ground that the principle of separation of powers requires that the judiciary refrain from interfering in those executive branch actions that involve questions of public policy, economic expediency and administrative practicability." *United States Fire Ins. Co. v. United States,* 806 F.2d 1529, 1535 (11th Cir. 1986)(citing, in part, Williams *v. United States;* 747 F.2d *700* (11th Cir.1984) (per curiam), affg *and adopting Williams ex rel. Sharpley v United States,* 581 F. Supp. 847, 852 (S.D. Ga.1983)); *see also Mid-South Holding Co., Inc. v. U.S.*, 225 F.3d 1201, 1204 (11th Cir. 2000) (noting that the Eleventh Circuit follows the majority holding that the SAA's waiver of immunity is subject to the discretionary function exception) (citing *Williams v. United States,* 747 F.2d 700, 700 (11th Cir.1984), *aff'g and adopting Williams By and Through Sharpley v. United States,* 581 F. Supp. 847 (S.D. Ga.1983)).

part of a federal agency or an employee of the Government; whether or not the discretion involved be abused." 28 U.S.C. § 2680(a).

The Supreme Court articulated a two-part test for determining whether the discretionary function exception bars the Government's liability in a particular case. Both parts of this test must be satisfied for the discretionary function exception to apply. *Berkovitz v. United States,* 486 U.S. 531, 536 (1988) (noting that the inquiry does not end with a determination that the challenged conduct involves an element of judgment; the court must also determine whether the judgment is the kind that the discretionary function exception was designed to shield).

First, the court must determine whether the nature and quality of conduct at issue involves an element of judgment or choice. *See Berkovitz,* 486 U.S. at 536 (citing *Dalehite v. United States,* 346 U.S. 15, 34 (1953)). If the conduct involves an element of judgment or choice, the court must then determine whether that judgment or choice was grounded in policy considerations. This is because the discretionary function exception is intended "to prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through- the medium of an action in tort" *United States v. Varig Airlines,* 467 U.S. 797, 814 (1984). Having said this, the Court recognizes that it is not necessary to find that the government actor actually weighed policy considerations before he or she acted. Instead, the focus is on whether the actions are "susceptible to policy analysis," *United States v. Gaubert,* 499 U.S. 315, 325 (1991).

Before applying this test, the Court must determine what conduct is protected by the discretionary function exception. The Government claims that the discretionary function exception applies to the Coast Guard's decision to rescue Brandon Lewis and its determination of how to conduct that rescue. In contrast, Plaintiffs' position is that, if the exception applies, it applies only to the Coast Guard's decision to rescue Brandon Lewis, not its determination of how it will conduct the rescue.

Plaintiffs' view is based on their belief that once the Coast Guard made the decision to rescue Brandon Lewis, it had no discretion to ignore the procedures set forth in the United States National Search and Rescue Supplement to the International Aeronautical and Maritime Search and Rescue Manual ("SAR Manual"), the Coast Guard Addendum to the SAR Manual ("Coast Guard Addendum"), and the Miami Search and Rescue Plan ("Miami SAR Plan").[2] (These manuals will be referred to collectively as "the Manuals") Plaintiffs claim that these documents dictate how the Coast Guard was to conduct a rescuer, like the one at issue: If Plaintiffs' contention is correct, then the discretionary function exception will not shield the Government from liability in this case because, if a federal statute, policy, or regulation specifically mandated the procedure for the Coast Guard to follow, the Coast Guard had no discretion to ignore these directives and use its own judgment. *See Gaubert,* 499 U.S. at 324.

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2. The Miami SAR Plan is for use in SAR operations by all federal agencies in the Seventh Coast Guard District, including Mayport. *See* Miami SAR Plan, Letter of Promulgation (Pls.'s Mt. for Summary Judgment (Dkt. 29), Ex. 33).

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Specifically, Plaintiffs argue that the following provisions from the Manuals dictate how the Coast Guard should have conducted the rescue of Brandon Lewis: When evaluating a rescue response, the person handling the SAR operation "should consider injuries or other medical conditions that might require special response rescue response." *See* SAR Manual, 6.3.1 (emphasis added). The SAR Manual states that this person should also consider:

> condition of survivors; (If not known, assume urgent medical attention will be required: If known, obtain a detailed description of injuries. This will determine the need for stretchers, oxygen, blood plasma, intravenous fluids, or other medical supplies.)

SAR Manual, 6.3.1. Although SAR personnel are not required to be experts in providing medical diagnosis or treatment of diving injuries, "SAR personnel in places with known diving activity should be able to recognize the general symptoms of dive-related injuries so that their potential severity is recognized and medical advice obtained, and basic steps are taken to minimize worsening occurrences. . . ." SAR Manual, 6.15.2 (emphasis added). The section in the Coast Guard Addendum regarding the emergency treatment for decompression sickness and air embolism provides that "[w]here the capability exists, the following steps are *advised*: . . . [a]dminister 100% oxygen." Coast Guard Addendum, 6.F.2(5) (emphasis added).

The use of the words "should" and "advised" seriously undermines Plaintiffs' contention that these provisions are

mandatory, rather than precatory. *See, e.g., Jolly v. Listerman*, 672 F.2d 935, 945 (D.C. Cir. 1982) ("The use of the word "should" detracts significantly from any claim that this guideline is more than merely precatory. The fact that it is described as a "guideline" should also hint of precatory intent."), *Hamlet v. United States*, 63 F.3d 1097, 1104 (Fed. Cir. 1995) (citing cases wherein the court found that the use of the "should," is precatory, not mandatory.). The preface to the BAR Manual illustrates this understanding:

> SAR planning is both an art and a science; relying greatly on the creativity and experience of the personnel involved. Because of the many variables encountered during SAR operations and the individuality of each SAR case, the *guidance provided in this* (manual] *must be tempered with sound judgement, having due regard for the* individual situation. Nothing in this Manual should be construed as relieving SAR personnel of the need for initiative and sound judgement. Therefore, few actions or procedures discussed in this Manual are mandatory. Use of the words "must" or "shall" only distinguish those actions or procedures normally considered mandatory from those that are discretionary.

SAR Manual, Vol. I, Preface 3(a) (emphasis added). The Discussion section of the Commandant Instruction M16130.2B of the Coast Guard Addendum states in even clearer language that "Coast Guard personnel are *expected to exercise broad discretion* in performing the functions discussed" therein. *See Coast* Guard Addendum,

COMDTINST M 16130.2B, at 2 (emphasis added). It continues, "[t]he Coast Guard *retains the discretion to deviate from or change* this guidance without notice. This document creates no duties, standard of care, or obligations to the public and should not be relied upon as a representation by the Coast Guard as to the manner of proper performance in any particular case." *Id.* (emphasis added). Miami SAR Plan uses the word "guidance" in explaining the purpose of the plan. The Miami SAR Plan sets forth procedures and internal *guidance* intended to maximize performance of Seventh District units involved in search and rescue missions. It does not define minimum performance standards, create Coast Guard obligations, nor create rights in third parties." *See* Miami SAR Plan, Letter of Promulgation (emphasis added). Thus, by their plain language, the Manuals cannot be interpreted as policy dictating a course of action.

Despite the above language from the Manuals, Plaintiffs are intent on reading mandatory language into these documents. In support of their position, Plaintiffs offer the deposition testimony of their expert, David E. Cole ("Cole"), a retired Coast Guard Commander. Plaintiffs contend that Cole's testimony creates a genuine dispute of material fact, precluding summary judgment on this issue. The Court disagrees. Although the existence of a genuine issue of material fact regarding the mandatory nature of a procedural policy precludes summary judgment, *see Commerce and Industry Ins. Co. v. Grinnell Corp.*, 280 F.3d 566, 573-75 (5th Cir. 2002), Cole's testimony does not create a material dispute of fact.

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In *Grinnell*, several insurance companies brought a subrogation action against the City of New Orleans for fire-loss claims. The suit was based upon the alleged negligent acts of members of the city's fire department. Although this was not a case arising under federal law, there was a state statute limiting liability for discretionary acts. In determining whether an act is discretionary, the Fifth Circuit, following the lead of the Louisiana courts, utilized the federal discretionary function exception analysis elaborated in *Berkovitz v. United States*, 486 U.S. 531, 536 (1988).

To prove that the actions taken by the city were not discretionary, the insurance companies in *Grinnell* offered testimony from the city's Chief of the Fire Department and its Chief Electrical Inspector. These individuals testified regarding internal policies mandating a specific course of action to be taken under circumstances that were present in that case.

Cole, unlike the witnesses in *Grinnell*, does not testify about an internal policy mandating the course of action for rescues by the Mayport Coast Guard. Instead, he insists that the Manuals mandate a course of action. His insistence, however, is based solely on what he thinks should have happened during this rescue, not what was "required" to, happen. This becomes clear early on in Cole's deposition, where Cole states:

> There are a great many variables to say you must do this and you must do that. The Coast Guard, God knows, has enough manuals for everything.

Appendix B

> What the Coast Guard must do is, when it does something, do it right. Than manuals provide *guidance* to that. The manuals try to foresee every circumstance that can come up, but I can tell you they don't. You've got to do the best you can. The manuals stress the seriousness of decompression sickness. The manuals don't say you must carry . . . whatever on every boat that gets underway. . . . *The Coast-Guard recognizes in its manuals that it's leaving a great deal up to its field personnel* . . . When you say what does the manual require, it requires the Coast Guard to save lives and to use everything available to do it. That's what the Coast Guard manuals require. . . . Doing what is proper and what is right is required. Now, where does it state everything that is proper and everything that is not proper specifically? I don't know of any Coast Guard publication that says that.

Depo. of Cole, pp. 57-58 (emphasis added). Although he adamantly believes the Coast Guard should have conducted the rescue differently than it did, Cole's belief is not based on mandatory language from the Manuals.

Accordingly; the Court finds that here is no statute, regulation, or policy in the record that supports Plaintiffs' position that a specific course of conduct was mandated in the rescue of Brandon Lewis. Instead, the Manuals confer upon the Coast Guard broad discretion to exercise its own judgment regarding a rescue like the one in this case. Thus, the exercise of judgment by the Coast Guard in this case-be

it deciding to rescue Brandon Lewis, deciding how to proceed with the rescue of Brandon Lewis, including the staffing and supplying of a rescue boat and training of its personnel, or deciding what resources to use in executing the rescue is clearly discretionary and of the nature and quality protected by the discretionary function exception. *See Northern Voyager LP v. Thanes Shipyard & Repair Co.*, 214 F. Supp. 2d 47, 51 (D. Mass. 2002) (noting that "[n]ot only does the very premise of emergency rescue logically suggest that decisions be made quickly and responsively, without the constraints of inflexible procedures, Coast Guard regulations and procedural handbooks specifically mandate as much").

The Court also finds that the second prong of the discretionary function exception is satisfied. "When established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion." *Gaubert*, 499 U.S. at 324. As noted above, the Manuals explicitly grant the Coast Guard the discretion to decide how to rescue an individual. Thus, it is presumed that its decisions in this regard involve policy considerations protected under the exception.

Additionally, the Eleventh Circuit's analysis of the discretionary function exception in *Ochran v. United States*, 117 F.3d 495 (11th Cir. 1997), persuades this Court that the decisions and ensuing actions taken by the Coast Guard in this case are borne out of policy considerations and protected by the discretionary function exception. In *Ochran*, the United States was sued for the actions of an Assistant United

States Attorney ("AUSA"), who assumed the responsibility of protecting a witness threatened by a criminal drug defendant. The Eleventh Circuit found that any alleged negligence in discharging this duty was not actionable because deciding how to protect a witness involves the "exercise of policy judgment" within the purview of the discretionary function exception. *Id.* at 506. In a footnote, the Eleventh Circuit did add a caveat to its finding when it emphasized that if the AUSA had promised to perform specific actions, such as stationing United States Marshals at the witness' door, and then negligently misplaced the paperwork necessary to make these arrangements, a different result may have been reached. *Id.* at 506 n.7.

Like the AUSA's decision in *Ochran*, the Coast Guard's decision to rescue Brandon Lewis and its decision how to proceed with the rescue of Brandon Lewis are protected by the discretionary function exception, as these decisions are unquestionably "susceptible to policy analysis." *Gaubert*, 499 U.S. at 325. Furthermore, the Coast Guard never made any specific promises about haw it would conduct the rescue. Thus, the Eleventh Circuit's caveat in *Ochran* would not afford Plaintiffs the ability to overcome the discretionary function exception.

There is yet another factor that convinces the Court that rescue decisions of Coast Guard Mayport are steeped in policy considerations. "Search and rescue" is only one of the Coast Guard's missions, *see, e.g.*, 14 U.S.C. § 2. Thus, the allocation of money and time for the execution of its missions or duties invokes policy considerations. *See, e.g., United States v. Varig Airlines*, 467 U.S. 797, 820 (1984)

(explaining that decisions requiring an agency "to establish priorities for the accomplishment of its policy objectives by balancing the objectives sought to be obtained against such practical considerations as staffing and funding" are protected by the discretionary function exception); *Ochran*, 117 F.3d at 502 (recognizing that "budgetary constraints are almost always important to government decisions" and that the allocation of limited government resources implicates policy considerations protected by the discretionary function exception). This allocation of funds and time necessarily includes Coast Guard Mayport's decisions about staffing and training its personnel and its decisions regarding whether or not to commit outside resources to a rescue. These decisions are quintessential examples of the kind of judicial "second-guessing" and intervention in policymaking decisions that the discretionary function exception was designed to prevent. *Varig Airlines*, 467 U.S. at 820.

Based on the above, the Court finds that the discretionary function exception shields the Government from liability for the decisions at issue here. Having found that the discretionary function exception applies in this case, the Court cannot reach the merits of Plaintiffs' Motion for Summary Judgment, as the Court is without subject matter jurisdiction to do so. *See Mid-South Holding Company, Inc. v. United States*, 225 F.3d 1201, 1207 (11th Cir.2000); *see also Cohen v. United States*, 151 F.3d 1338, 1340 (11th Cir.1998) (characterizing sovereign immunity as an issue of subject matter jurisdiction).

Accordingly, it is **ORDERED:**

1. The Government's Motion to Dismiss (Dkt. 32) is **GRANTED**.

2. All pending motions are **DENIED AS MOOT.**

3. The Clerk is directed: to enter final judgment in favor of the Government and against Plaintiffs and close this case.

DONE AND ORDERED in Chambers this 6 day of November, 2002.

s/ Henry Lee Adams, Jr.
HENRY LEE ADAMS, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING FILED MARCH 12, 2004

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 02-16450-CC

JOE LEWIS, as parent and guardian of Brandon D. Lewis, JUDY LEWIS, as parent and guardian of Brandon D. Lewis, BRANDON D. LEWIS, an individual Florida resident,

Plaintiffs-Appellants,

versus

UNITED STATES OF AMERICA, U.S COAST GUARD,

Defendants-Appellees.

On Appeal from the United States District Court for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, ____ F.2d ____).

Before: BLACK, HULL and COX, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules

of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ E.R. Cox
UNITED STATES CIRCUIT JUDGE

(2)

Supreme Court, U.S.
FILED
OCT 4 - 2004
OFFICE OF THE CLERK

No. 03-1655

In the Supreme Court of the United States

JOE LEWIS, AS PARENT AND GUARDIAN OF BRANDON D. LEWIS, JUDY LEWIS, AS PARENT AND GUARDIAN OF BRANDON D. LEWIS, AND BRANDON D. LEWIS, AN INDIVIDUAL FLORIDA RESIDENT, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners' tort action against the United States under the Suits in Admiralty Act is barred because the suit challenges discretionary policy judgments of the United States Coast Guard.

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In the Supreme Court of the United States

No. 03-1655

JOE LEWIS, AS PARENT AND GUARDIAN OF BRANDON D. LEWIS, JUDY LEWIS, AS PARENT AND GUARDIAN OF BRANDON D. LEWIS, AND BRANDON D. LEWIS, AN INDIVIDUAL FLORIDA RESIDENT, PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published, but the decision is noted at 88 Fed. Appx. 384 (Table). The opinion of the district court (Pet. App. 5a-17a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 20, 2003. Petitions for rehearing were denied on March 12, 2004 (Pet. App. 18a-19a). The petition for a writ of certiorari was filed on June 10, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Suits in Admiralty Act (SAA) waives the federal government's sovereign immunity from maritime tort actions. See 46 U.S.C. app. 742. Nearly every circuit has concluded that the SAA's waiver of sovereign immunity is subject to an exception for acts involving discretionary functions, along the lines of the discretionary function exception to the Federal Tort Claims Act (FTCA), 28 U.S.C. 2680(a). See, *e.g.*, *Drake Towing Co.* v. *Meisner Marine Constr. Co.*, 765 F.2d 1060, 1063-1064 (11th Cir. 1985).[1] The discretionary function exception to the FTCA provides, in relevant

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[1] Nine other courts of appeals also have held that cases brought under the SAA are subject to an implied discretionary function exception. See *Canadian Transp. Co.* v. *United States*, 663 F.2d 1081, 1085-1086 (D.C. Cir. 1980); *Gercey* v. *United States*, 540 F.2d 536, 539 (1st Cir. 1976), cert. denied, 430 U.S. 954 (1977); *In re Joint E. & S. Dists. Asbestos Litig.*, 891 F.2d 31, 35 (2d Cir. 1989); *Sea-Land Serv., Inc.* v. *United States*, 919 F.2d 888, 891 (3d Cir. 1990), cert. denied, 500 U.S. 941 (1991); *Wiggins* v. *United States*, 799 F.2d 962, 966 (5th Cir. 1986); *Baldassaro* v. *United States*, 64 F.3d 206, 208 (5th Cir. 1995), cert. denied, 517 U.S. 1207 (1996); *Graves* v. *United States*, 872 F.2d 133, 137 (6th Cir. 1989) (citing *Chotin Transp., Inc.* v. *United States*, 819 F.2d 1342, 1347 (6th Cir.) (en banc), cert. denied, 484 U.S. 953 (1987)); *Bearce* v. *United States*, 614 F.2d 556, 559-560 (7th Cir.), cert. denied, 449 U.S. 837 (1980); *Earles* v. *United States*, 935 F.2d 1028, 1031-1032 (9th Cir. 1991); *Tew* v. *United States*, 86 F.3d 1003, 1005 (10th Cir. 1996). A panel of the Fourth Circuit has taken a contrary view, see *McMellon* v. *United States*, 338 F.3d 287, 292 (2003) (following prior circuit decisions in declining to imply a discretionary function exception to the SAA), but that court granted rehearing en banc in *McMellon*, No. 02-1494 (4th Cir. Oct. 8, 2003), thereby vacating the panel opinion, see 4th Cir. R. 35(c).

In any event, petitioners have not challenged the applicability of the discretionary function exception to cases brought under the SAA. See, *e.g.*, Pet. 15.

part, that the government retains immunity from suits "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. 2680(a).

b. A two-part inquiry guides courts' application of the discretionary function exception. See *United States* v. *Gaubert*, 499 U.S. 315, 322-323 (1991). A court must first examine the alleged tortious act to determine whether it was "discretionary in nature"—that is, whether it involved "an element of judgment or choice." *Id.* at 322 (quoting *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988)). This element of judgment or choice is not involved where an employee disobeys a "federal statute, regulation, or policy" that "'specifically prescribes a course of action for [the] employee to follow,' because 'the employee has no rightful option but to adhere to the directive.'" *Ibid.* (quoting *Berkovitz*, 486 U.S. at 536); see *id.* at 324 ("If the employee violates [a] mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy.").

If it is determined that "the challenged conduct involves an element of judgment," *Berkovitz*, 486 U.S. at 536, the discretionary function exception applies so long as the judgment was "of the kind that the discretionary function exception was designed to shield," *Gaubert*, 499 U.S. at 322-323 (quoting *Berkovitz*, 486 U.S. at 536). And the exception is designed to shield judgments involving policy; stated differently, it is intended to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Id.* at 323 (quoting *United States* v. *Varig*

Airlines, 467 U.S. 797, 814 (1984)). In this second stage of the analysis, "[t]he focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are *susceptible* to policy analysis." *Id.* at 325 (emphasis added). Further, the discretionary function exception protects discretionary decisions of government employees whether at the "policy or planning level" or the "operational" level. *Ibid.*

2. Petitioner Brandon Lewis[2] was injured when he developed the "bends" while scuba diving off the coast of Florida on February 13, 2000. Pet. App. 2a, 6a. The United States Coast Guard responded to a radio message from Mr. Lewis's companions reporting his condition and requesting assistance. Dist. Ct. Doc. 33, Exh. 3, at 2. The Coast Guard sent a boat crew to assist, which met the boat carrying Mr. Lewis and his associates, took Mr. Lewis on board, and brought him to the Coast Guard station, where the Coast Guard had arranged to have a hospital helicopter ready to transport him to the closest hospital capable of treating a dive injury. *Ibid.* The Coast Guard boat crew did not administer oxygen to Mr. Lewis during transit because neither oxygen nor personnel trained to administer oxygen were on board the Coast Guard vessel. *Id.* Exh. 6, at 77; Exh. 7, at 25; Exh. 8, at 27.

3. Petitioners filed suit against the government under the SAA, alleging that the Coast Guard acted negligently during the rescue operation. See Pet. 4-5; Pet. App. 2a, 6a. In particular, petitioners asserted that

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[2] Petitioners in this case are Brandon Lewis (Mr. Lewis) and Joe and Judy Lewis (Mr. Lewis's parents and guardians).

the Coast Guard should have administered oxygen to Mr. Lewis. See Pet. 4.

4. The district court granted the government's motion to dismiss, which it converted to a motion for summary judgment, concluding that it lacked jurisdiction over petitioners' claims against the United States because those claims challenged discretionary functions of the Coast Guard. Pet. App. 5a-6a, 16a.

The district court held that the discretionary function exception applied to both the Coast Guard's decision to rescue Mr. Lewis and its determination of how that rescue would be conducted. Pet. App. 15a-16a. Regarding the first aspect of the applicable framework —whether the act in question was discretionary—the district court noted that, while petitioners argued that various provisions of Coast Guard manuals dictated how the Coast Guard was to conduct a rescue, the provisions at issue were precatory, rather than mandatory, and expressly allowed for discretion. *Id.* at 8a-14a.[3]

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[3] For example, the United States National Search and Rescue Supplement to the International Aeronautical and Maritime Search and Rescue Manual (the Manual) describes factors a rescuer "should consider" in evaluating a rescue response, and the Coast Guard Addendum to the Manual "*advis*[es]" the administration of oxygen for decompression sickness "[w]here the capability exists." Pet. App. 9a (second alteration in original). The district court emphasized a provision in the Manual explaining that "the *guidance provided in this* [manual] *must be tempered with sound judgement, having due regard for the* individual situation. * * * Therefore, few actions or procedures discussed in this Manual are mandatory." *Id.* at 10a (first alteration in original). The court further noted that provisions of the Coast Guard Addendum state that "'Coast Guard personnel are *expected to exercise broad discretion* in performing the functions discussed' therein," *ibid.*, and that the Addendum "creates no duties, standard of care, or obligations to the public and should not be relied

The district court therefore held that there was "no statute, regulation, or policy in the record that supports [petitioners'] position that a specific course of conduct was mandated in the rescue of Brandon Lewis." Pet. App. 13a. Instead, the court found, "the Manuals confer upon the Coast Guard broad discretion to exercise its own judgment regarding a rescue like the one in this case." *Ibid.* Thus, the district court concluded that

> the exercise of judgment by the Coast Guard in this case—be it deciding to rescue Brandon Lewis, deciding how to proceed with the rescue of Brandon Lewis, including the staffing and supplying of a rescue boat and training of its personnel, or deciding what resources to use in executing the rescue [—] is clearly discretionary and of the nature and quality protected by the discretionary function exception.

Id. at 13a-14a.

Turning to the second element of the inquiry —whether the discretionary decisions at issue were based on considerations of public policy—the district court observed that, under *Gaubert*, when the applicable governmental policy "allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion." Pet. App. 14a (quoting *Gaubert*, 499 U.S. at 324). Since the applicable manuals grant dis-

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upon as a representation by the Coast Guard as to the manner of proper performance in any particular case," *id.* at 11a. Similarly, the Miami Search and Rescue plan states that it provides "internal *guidance*" and "does not define minimum performance standards, create Coast Guard obligations, nor create rights in third parties." *Ibid.* The district court concluded that "by their plain language, the Manuals cannot be interpreted as policy dictating a course of action." *Ibid.*

cretion to Coast Guard personnel in the conduct of rescue operations, the court concluded that the decisions made by Coast Guard rescuers presumably involve protected policy judgments. *Ibid.* The court noted that its conclusion was confirmed by the fact that policy determinations were involved in the Coast Guard's decisions regarding staffing, training, equipment, and the allocation of resources among the Coast Guard's various congressionally authorized functions. *Id.* at 15a-16a (citing *Varig Airlines*, 467 U.S. at 820).

Having determined that it lacked subject-matter jurisdiction, the district court granted the government's motion to dismiss. Pet. App. 16a-17a.

5. The court of appeals affirmed in a brief, unpublished, per curiam order. Pet. App. 1a-4a. Observing that "the language cited by [petitioners] in the applicable manuals is discretionary and not mandatory," the court concluded that "[t]he discretion to undertake the rescue extends not only to the decision to rescue, but also to the methods chosen by the Coast Guard to effectuate the rescue" of Mr. Lewis. Pet. App. 3a. Accordingly, the court of appeals upheld the district court's dismissal of this case for lack of subject-matter jurisdiction. *Id.* at 4a.

ARGUMENT

The unpublished judgment of the court of appeals does not warrant review by this Court. The court of appeals' decision does not conflict with any decision of this Court or of any other court of appeals; nor does it present any issue of general importance warranting further review. Moreover, the Eleventh Circuit correctly applied settled law as articulated by this Court to the facts of this case.

1. a. Contrary to petitioners' assertion, the Eleventh Circuit's decision in this case does not contradict this Court's holding in *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955). In that case, the plaintiffs alleged that the Coast Guard had negligently failed to maintain a lighthouse or to warn mariners that it was not working. See *id.* at 62. Significantly, the government did not rely on the discretionary function exception in *Indian Towing*. See 350 U.S. at 64; see also *Gaubert*, 499 U.S. at 326 (noting that in *Indian Towing* the government did not contend that the discretionary function exception applied); *Varig Airlines*, 467 U.S. at 812 (same). Instead, the government contended that the FTCA did not waive sovereign immunity from claims concerning negligent performance of "uniquely governmental functions," 350 U.S. at 64, like the maintenance of lighthouses, relying on the FTCA's language imposing liability on the government "in the same manner and to the same extent as *a private individual* under like circumstances," 28 U.S.C. 2674 (emphasis added).

This Court rejected the government's position, holding that the FTCA's waiver of sovereign immunity applies even if the alleged tortious conduct is not of a kind generally performed by private individuals. See *Indian Towing*, 350 U.S. at 67 ("[W]e would be attributing bizarre motives to Congress were we to hold that it was predicating liability on such a completely fortuitous circumstance—the presence or absence of identical private activity."). In addition, the Court focused on the "under like circumstances" language in the FTCA and observed that the Good Samaritan doctrine subjects private parties to liability for undertaking tasks similar to the erection of a lighthouse. *Id.* at 64-65 ("[I]t is hornbook tort law that

one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good Samaritan' task in a careful manner."); see *id.* at 69 (articulating further the government's duty under the general maritime law to use due care in maintaining the lighthouse). The *Indian Towing* Court's statements regarding the Good Samaritan doctrine concern only the scope of the government's tort liability, not the application of the discretionary function exception. Here, of course, the question presented is whether the discretionary function exception preserves the government's sovereign immunity from petitioners' suit—a question that does not implicate *Indian Towing*'s holding.[4]

b. Petitioners also maintain that the Eleventh Circuit's decision conflicts with distress-at-sea cases decided by other courts of appeals that have declined to apply the discretionary function exception where the plaintiff established the government's Good Samaritan liability. See Pet. 16-22. Petitioners misconstrue those cases. None stands for the proposition that the discretionary function exception does not apply if the requirements of the Good Samaritan doctrine are met. Rather, most of those cases do not discuss the discretionary function exception at all. See *Sagan* v. *United States*, 342 F.3d 493, 498-500 (6th Cir. 2003) (reversing the

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[4] In a footnote in *Berkovitz*, this Court suggested that the discretionary function exception was inapplicable in *Indian Towing*. 486 U.S. at 538 n.3; see *Gaubert*, 499 U.S. at 326. Even so, the technical conduct at issue in *Indian Towing* (*i.e.*, "making sure the light was operational," *Gaubert*, 499 U.S. at 326) differs significantly from the discretionary policy judgments targeted by petitioners' claims in this litigation (*i.e.*, the Coast Guard's decisions regarding the training of its employees and the equipping and staffing of its vessels).

district court's grant of summary judgment for the government on proximate cause; not mentioning the discretionary function exception); *United States* v. *Sandra & Dennis Fishing Corp.*, 372 F.2d 189, 195, 197 (1st Cir.) (discussing the scope of the government's duty of care; not considering the discretionary function exception), cert. denied, 389 U.S. 836 (1967);[5] *United States* v. *DeVane*, 306 F.2d 182, 185-186 (5th Cir. 1962) (explaining the scope of the Good Samaritan doctrine; not discussing the discretionary function exception); *United States* v. *Gavagan*, 280 F.2d 319, 326-329 (5th Cir. 1960) (discussing the Coast Guard's duty during the conduct of rescue operations; not discussing the discretionary function exception), cert. denied, 364 U.S. 933 (1961);[6] see also *Hurd* v. *United States*, 34 Fed. Appx. 77, 81-85 (4th Cir. 2002) (concluding that the district court did not clearly err in finding that the Coast Guard attempted to aid the decedents and that

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[5] In a subsequent case, the First Circuit held that the discretionary function exception barred a claim alleging that the Coast Guard behaved negligently in ordering the evacuation of a distressed vessel during a rescue operation. See *Thames Shipyard & Repair Co.* v. *United States*, 350 F.3d 247, 254-257 (2003). That court distinguished *Sandra & Dennis Fishing Corp.* on the grounds that, there, the government did not rely on the discretionary function exception and the Coast Guard's negligence involved "mere technical, navigational missteps." *Id.* at 256.

[6] Even if the court of appeals' decision in this case were in conflict with *DeVane* or *Gavagan*, which, as decisions of the old Fifth Circuit, are binding on the Eleventh Circuit, "[i]t is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). Of course, the Eleventh Circuit correctly perceived no conflict with those decisions, which do not even address the discretionary function exception, as underscored by the denial of en banc review. Pet. App. 18a-19a.

its conduct was reckless and worsened decedents' positions; not addressing the discretionary function exception);[7] cf. *Rodrigue* v. *United States*, 968 F.2d 1430, 1434 (1st Cir. 1992) (addressing whether the Air Force's denial of the plaintiff's administrative claim for relief under the Military Claims Act, 10 U.S.C. 2731 *et seq.*, violated due process; not considering the discretionary function exception).

Most of the cases cited by petitioners simply articulate and apply the proposition that, while voluntary undertakings do not ordinarily create tort duties, a duty of care is created, under the Good Samaritan doctrine, by a voluntary (or discretionary) undertaking, if the undertaking induced detrimental reliance or otherwise increased the risk of harm to the plaintiff. See *Sagan*, 342 F.3d at 498; *Hurd*, 34 Fed. Appx. at 84; *Sandra & Dennis Fishing Corp.*, 372 F.2d at 195; *DeVane*, 306 F.2d at 186; *Gavagan*, 280 F.2d at 328-329; see also *Indian Towing*, 350 U.S. at 64-65, 69. See generally Restatement (Second) of Torts §§ 323, 324A

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[7] The government did not raise the discretionary function exception before either the Fourth Circuit or the district court in *Hurd*. (At that time, the applicability of the exception in cases brought under the Suits in Admiralty Act was unclear in the Fourth Circuit. Compare *Tiffany* v. *United States*, 931 F.2d 271, 276-277 (4th Cir. 1991), cert. denied, 502 U.S. 1030 (1992), and *Faust* v. *South Carolina State Highway Dep't*, 721 F.2d 934, 938-939 (4th Cir. 1983), cert. denied, 467 U.S. 1226 (1984), with *Lane* v. *United States*, 529 F.2d, 175, 179 (4th Cir. 1975); see note 1, *supra*.) Nevertheless, the district court in *Hurd* opined that the discretionary function exception did not apply on the facts of that case because the responsible Coast Guard employee terminated a search initiated in response to a distress call without performing certain mandatory actions. See *Hurd* v. *United States*, 134 F. Supp. 2d 745, 768-769 & n.28 (D.S.C. 2001). This district-court dicta obviously does not create a circuit split.

(1965). Here, however, the issue is whether the discretionary function exception preserves the government's sovereign immunity from petitioners' suit, not whether petitioner has a valid cause of action or whether the Coast Guard owed Mr. Lewis a duty of care on the facts of this case. Because the courts below correctly concluded that the discretionary function exception bars this suit, they had no need to reach the question whether the government could be held liable under the Good Samaritan doctrine if it had waived its sovereign immunity.[8]

The other circuit decision on which petitioners rely, *Huber* v. *United States*, 838 F.2d 398 (9th Cir. 1988), provides no support for petitioners' theory that the existence of a duty of care under the Good Samaritan doctrine automatically renders the discretionary function exception inapplicable. There, the Ninth Circuit held that, after the Coast Guard told a sinking vessel that it would provide some navigational assistance, its failure to follow through was not a discretionary judgment susceptible to policy analysis. See *id.* at 401 (stating that "the Coast Guard failed to monitor the radio channel it had instructed the [vessel] to use, failed

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[8] Thus, petitioners' first question presented (Pet. i) does not accurately articulate the issue in this case. It asks "[d]oes the discretionary function exception afford absolute immunity to the Coast Guard during search and rescue operations; or is the Coast Guard obligated to use due care once it makes a decision to institute a search and rescue operation and/or render aid to a mariner in distress?" The question of the scope of the Coast Guard's duty under general maritime law tort principles arises only after the jurisdictional question regarding the applicability of the discretionary function exception to the SAA's waiver of sovereign immunity—the only question reached by the courts below—has been answered.

to investigate when the [vessel] missed the scheduled communication check, and, apparently, forgot about the [vessel] in the chaos of the evening"). *Huber* is inapposite because, in that case, the asserted negligence of the Coast Guard did not arise from carrying out Coast Guard policy. Here, by contrast, the negligence petitioners assert stems directly from Coast Guard policy determinations not to equip all of its vessels with oxygen or staff all vessels with personnel qualified to administer oxygen. Cf. *Alfrey* v. *United States*, 276 F.3d 557, 567 (9th Cir. 2002) (distinguishing *Huber* in part because, there, "the government's choice did not implicate an allocation of resources"). In any event, any differences between this case and *Huber* stem from the very different factual scenarios and do not represent any conflict in legal authority that would merit this Court's review.

Consequently, since the Eleventh Circuit's factbound and unpublished decision in this case created no conflict with a decision of any other court of appeals, it poses no threat to the uniformity of maritime law, despite petitioners' representation to the contrary (Pet. 13, 18).

2. In any event, the court of appeals correctly concluded that this case falls within the scope of the discretionary function exception. Primarily, petitioners maintain that the Coast Guard should have administered oxygen to Mr. Lewis during transit. Pet. 4-5.[9] This was

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[9] At times, petitioners also allege that Coast Guard personnel negligently decided to undertake the rescue of Mr. Lewis. See, *e.g.*, Pet. 5 ("The Coast Guard should have simply declined the search and rescue and allowed the Lewis vessel to transport Mr. Lewis more quickly to shore."). But petitioners have conceded that the United States retains immunity under the discretionary function exception from any claim that Coast Guard personnel abused their discretion or acted negligently in deciding to rescue

not done, however, because neither oxygen nor personnel trained to administer oxygen were on board the Coast Guard boat. Dist. Ct. Doc. 33, Exh. 6, at 77; Exh. 7, at 25; Exh. 8, at 27. Congress granted the Coast Guard discretion to conduct rescues, in addition to its other responsibilities. See 14 U.S.C. 88(a) (providing that Coast Guard "may" rescue persons or property); 14 U.S.C. 88(b)(1) (providing that the Coast Guard "may render aid to persons and protect and save property at any time and at any place at which Coast Guard facilities and personnel are available and can be effectively utilized").[10] Accordingly, the Coast Guard's judgments regarding whether to equip its vessels with oxygen and to train its employees to administer oxygen are discretionary policy judgments concerning the allocation of resources; the discretionary function exception was designed to shield these judgments from civil liability and judicial second-guessing. See *Varig Airlines*, 467 U.S. at 814.[11] Further, petitioners cannot, by chal-

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Mr. Lewis. See, *e.g.*, Pet. 8-9 ("In fact, the Eleventh Circuit's opinion fails to recognize that the discretionary function exception only affords the Coast Guard sovereign immunity for the decision of *whether* to undertake a search and rescue.").

[10] The many functions Congress has entrusted to the Coast Guard include, among others, national security, 14 U.S.C. 1, 2; promulgation and enforcement of safety regulations, 14 U.S.C. 2; conduct of search and rescue, 14 U.S.C. 2, 88; law enforcement, 14 U.S.C. 2, 89; oceanographic research, 14 U.S.C. 2; and creation and operation of aids to navigation, 14 U.S.C. 2, 81.

[11] Petitioners assert (Pet. 7), without any citation to the record, that the Coast Guard Commandant issued a directive that all Coast Guard first responders be trained in the administration of oxygen through the Divers Alert Network (DAN) program. This contention is baseless because no mandatory directive was ever issued. As the government established below, in 1996, the former Chief of the Operational Medicine Branch at Coast Guard Head-

lenging the conduct of the personnel involved with the rescue of Mr. Lewis, avoid the government's sovereign immunity from claims attacking this discretionary decision. See *Dalehite* v. *United States*, 346 U.S. 15, 36 (1953) ("Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable. If it were not so, the protection of § 2680(a) would fail at the time it would be needed, that is, when a subordinate performs or fails to perform a causal step, each action or nonaction being directed by the superior, exercising, perhaps abusing, discretion."); see also *Gaubert*, 499 U.S. at 337-338 (Scalia, J., concurring in part and concurring in the judgment) (stating that the discretionary function exception applies when an employee performs in accordance with the relevant policy, even if she does not herself make policy decisions and she acts negligently).[12] Thus, the courts

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quarters had sought permission to use a DAN video as part of proposed training to Coast Guard first responders in oxygen therapy. Dist. Ct. Doc. 33, Exh. 12, at 2, para. 7. The proposed training was part of a policy initiative which has the "aim of providing a trained medical responder on every Coast Guard [Search and Rescue] Mission." *Ibid.* The policy initiative is still ongoing but "has not been implemented Coast Guard-wide" because of competing budget priorities and insufficient staff. *Id.* at 3. Moreover, the Coast Guard Commandant "was not briefed on the 1996 correspondence with DAN and the use of the DAN video for training Coast Guard personnel." *Id.* at 3-4, para. 9.

[12] To the extent that petitioners challenge other aspects of the Coast Guard personnel's conduct during the rescue of Mr. Lewis, those allegations also are barred by the discretionary function exception. The relevant statements of governmental policy contained in the record conferred substantial discretion on the Coast Guard rescuers to use their judgment in rescuing Mr. Lewis. See

below correctly concluded that the Suits in Admiralty Act did not waive the government's sovereign immunity from claims implicating the Coast Guard's decisions regarding the equipping and staffing of its vessels and the training of its crews.

3. Finally, petitioners' second question presented—regarding the remedies available if the discretionary function exception were inapplicable to this case and the government were found liable—was not reached by either of the lower courts, since both courts found that they lacked subject-matter jurisdiction. Of course, this Court's ordinary practice is "not [to] decide in the first instance issues not decided below." *National Collegiate Athletic Ass'n* v. *Smith*, 525 U.S. 459, 470 (1999); accord *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 109 (2001); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976) (per curiam). In addition, significant factual conflicts exist in this case concerning the applicability of the Good Samaritan doctrine (and, thus, the extent to which the Coast Guard owed a duty of care to Mr. Lewis), whether Coast Guard personnel acted negligently, and whether Coast Guard personnel caused any

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Pet. App. 8a-13a; pp. 5-6 & note 3, *supra*. Inasmuch as Coast Guard policy expressly contemplated that Coast Guard personnel would use their discretion and judgment in conducting a search and rescue, this Court has instructed that the policy-based nature of this conduct can be presumed. See *Gaubert*, 499 U.S. at 324; see also *Varig Airlines*, 467 U.S. at 820 (holding that the alleged negligence of the employees that administered the government program at issue was not actionable and noting that the employees "necessarily took certain calculated risks, but those risks were encountered for the advancement of a governmental purpose and pursuant to a specific grant of authority in the regulations and operating manuals").

of Mr. Lewis's injuries.[13] The lower courts also did not reach any of these factbound issues, which would need to be resolved before the issue of remedies would arise.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2004

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[13] Petitioners incorrectly suggest (Pet. 10-11, 16) that the discretionary function exception applies only if the government acts with "due care." The phrase "due care" appears in the FTCA in the portion of Section 2680(a) that shields the government from tort liability for claims "based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid[.]" That clause is not at issue in this case. See *Dalehite*, 346 U.S. at 32-34 (distinguishing between the two clauses in section 2680(a)). The aspect of the discretionary function exception relied on by the government here applies "whether or not the discretion involved be abused." 28 U.S.C. 2680(a); see also *Dalehite*, 346 U.S. at 33 (explaining that this language "connotes both negligence and wrongful acts in the exercise of the discretion because the [FTCA] itself covers only [the] 'negligent or wrongful act or omission of any employee,' 'within the scope of his office' 'where the United States, if a private person, would be liable' ") (quoting 28 U.S.C. 1346(b)).

(3)

No. 03-1655

Supreme Court, U.S.
FILED
OCT 20 2004
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IN THE

Supreme Court of the United States

JOE LEWIS and JUDY LEWIS, as Parents and Guardians of BRANDON D. LEWIS, and BRANDON D. LEWIS, an Individual Florida Resident,

Petitioners,

v.

THE UNITED STATES OF AMERICA, THE UNITED STATES COAST GUARD,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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Respondent interjects misstatements of law and fact which constitute new matters before this Honorable Court.

I. NO DISCRETION TO ACT NEGLIGENTLY DURING A SEARCH AND RESCUE. Under the discretionary function exception, the specific act to be examined here is the act of removing the injured diver to the Coast Guard vessel, engendering reliance that this would result in quicker treatment for the diver, when the Coast Guard knew – or should have known – that this would delay the moment when he would be able to get the oxygen he so desperately needed.

As a result of the Lewis vessel's reliance on the Coast Guard's search and rescue expertise and response to their distress call, Mr. Lewis became a victim of a severe spinal cord injury which has left him with permanent partial paralysis, incontinence and cognitive deficits at the age of seventeen. (R. 72). The Coast Guard made the plaintiff affirmatively worse off, since he would have received the critical oxygen sooner if the Lewis vessel had simply proceeded on its own to a point ashore where oxygen could have been administered. The civilian boat was faster, and precious time was wasted transferring Mr. Lewis to the Coast Guard boat.

The Eleventh Circuit's opinion expressly conflicts with the decisions of the First and Fourth Circuits in this regard:

> The Coast Guard holds itself out to the public as an expert in maritime search and rescue. It is, therefore, reasonable for others to perceive members of the Coast Guard as experts if they do not affirmatively disclaim competency in a particular case.

Hurd v. United States, 34 Fed.Appx. at 84-5.

> By its silence when it accepted the mission it must be found that the Coast Guard led the [rescuees] to believe that the [Coast Guard vessel] was reasonably capable of performing the task. This would include a representation that she was competently manned, or, to put it another way, the silence was an undertaking

> that the [Coast Guard crew] would perform its functions with reasonable care.

United States v. Sandra & Dennis Fishing Corp., 372 F.2d 189, 195 (1st Cir. 1967).

Those aboard the Lewis vessel were lured into relying on Coast Guard's public professions of expertise. In the midst of an emergency, when the Coast Guard offers to help, a layman on a boat naturally believes that the Coast Guard's offer really will constitute help, and not a setback, making a victim worse off. This satisfies the Good Samaritan doctrine. *Restatement (Second) of Torts* § 323 and § 324A. But even when the Good Samaritan standard of liability is met, the Eleventh Circuit nevertheless now holds that the government is virtually *always* immune for whatever harm the Coast Guard may do – so long as it is purporting to carry out a rescue on the water.

In its brief, the government declines to acknowledge that the Eleventh Circuit stands starkly at odds with the remaining circuits that have addressed this kind of fact pattern – and with the whole of rescue jurisprudence up until a year ago. *See contra.*, *Northern Voyager LP v. Thames Shipyard & Repair Co.*, 350 F.3d 247 (1st Cir. 2003). Before then, the jurisprudence was uniform, reaching back at least to *Indian Towing*: once the government undertakes a task (like keeping a light in a lighthouse burning or rescuing someone at sea), it is as responsible in tort for its lapses, just as any civilian would be.

The idea that the discretionary function exception swallows the liability of the Good Samaritan standard — as adopted recently by the First and Eleventh Circuits — has been raised before. In every situation, the government's plea of the discretionary function exception has been rejected. In fact, there is a quite a logical and workable dividing line between the realm of liability under the Good Samaritan doctrine, on the one hand, and the reach of the discretionary function exception on the other.

A. Questions Presented Merit Immediate Supreme Court Review. Respondents' attempt to restate the questions presented

to this Court misses the proverbial boat. Petitioners challenge the Eleventh Circuit's finding that the Coast Guard does not have to act with reasonable care in conducting a search and rescue and the elimination of government tort liability.

The Eleventh Circuit has now departed from nearly 50 years of maritime jurisprudence. The Eleventh Circuit's decision conflicts with this Court's precedent and the decisions of the First, Fourth, Fifth, Sixth and Ninth Circuit Courts of Appeals. Each of these circuits have either explicitly or implicitly discussed the discretionary function exception in finding the Coast Guard amenable to suit for negligently conducted search and rescue missions.

B. Discretionary Function Exception Rejected in Search and Rescues. Respondents do not address the well-settled rule of law that once the Coast Guard undertakes a rescue and engenders reliance thereon, the Coast Guard is obligated to use reasonable care in carrying out the rescue. *United States v. DeVane*, 306 F.2d 182, 186 (5th Cir. 1962)[1]; *United States v. Gavagan*, 280 F.2d 319, 328 (5th Cir. 1960) (analogizing this Court's holding in *Indian Towing* to a Coast Guard search and rescue); *United States v. Sandra & Dennis Fishing Corp.*, 372 F.2d 189, 195-96 (1st Cir. 1967) (Coast Guard's duty to use reasonable care during search and rescue extends to implicit representations that the Coast Guard "would perform its functions with reasonable care."); *Sagan v. United States*, 342 F.2d 493, 498 (2d Cir. 2003) ("However, once the Coast Guard undertakes a rescue operation, it must act with reasonable care."); *Huber v. United States*, 838 F.2d 398, 401-02 (9th Cir. 1988) ("This is not a case where the Coast Guard decided to conserve its resources by not assisting vessels in certain situations. Instead, the Coast Guard decided to aid the [vessel], and then allegedly did so in a

1. Contrary to Respondents' contentions (Br. 10, fn 6), the Eleventh Circuit has violated its own controlling precedent as the circuit court is bound by the former Fifth Circuit's decisions of *Gavagan* and *DeVane* absent a decision from the Eleventh Circuit sitting en banc. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981)(en banc).

negligent manner."); *Hurd v. United States*, 134 F.Supp.2d 745, 768-69 (D. S.C. 2001) (discretionary function exception does not apply because the "Coast Guard exercised its discretion by making the policy decision to render aid in the search and rescue operation, and concomitantly was obligated to exercise reasonable care in the operation."), *aff'd*, 34 Fed.Appx. 77, 2002 AMC 1584, 2002 WL 7300284 (4th Cir. 2002) (unpublished)[2]; *see Indian Towing v. United States*, 350 U.S. 61, 69 (1955) ("once [Coast Guard] exercised its discretion to operate a light . . . and engendered reliance . . . it was obligated to use due care. . . .")[3].

None of these decisions were discussed by the district court or circuit court below. Respondents mistakenly contend that the aforementioned cases do not implicate the discretionary function exception. Not only does this argument misread the plain text of these opinions but also directly contradicts the government's arguments to those courts. Perhaps, the easiest explanation is that, until now, no court has applied the discretionary function exception in a single distress-at-sea case which met the Good Samaritan criteria. *Cf., Northern Voyager LP v. Thames Shipyard & Repair Co., supra.*

Rescue jurisprudence has always followed and validated this distinction. When the claim is that the government failed to participate, or to be properly equipped, it fails to satisfy the Good Samaritan doctrine, and fails for that reason, sometimes

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2. Respondents' arguments and supplemental memorandum relating to the perceived uncertainty in the Fourth Circuit (i.e. whether the Federal Tort Claims Act's discretionary function exception applies to cases brought under the Suits in Admiralty Act) are irrelevant to the conflict between the Eleventh and Fourth Circuits. In *Hurd*, the district court found the Coast Guard negligent of wanton and reckless conduct after a thorough analysis assuming that the discretionary function exception did apply to the Suits in Admiralty Act. 134 F.Supp.2d at 768.

3. *See Berkovitz v. United States*, 486 U.S. 531, 538, fn. 2 (1988) ("The decision in *Indian Towing v. United States*, also illuminates the appropriate scope of the discretionary function exception.") (internal citation omitted).

coupled with a discretionary function analysis. When the claim is that the government undertook to participate and caused harm by making the plaintiff worse off, it satisfies the Good Samaritan doctrine, and the discretionary function exception is not raised by the government, or is not mentioned by the court, or is overtly rejected.

Had the rule recently adopted by the First and Eleventh Circuits been the law, however, it would have reversed the outcome in virtually all the cases where the Coast Guard has been held liable heretofore. *See DeVane, supra*; *Huber, supra*; *Sagan, supra*; *Hurd, supra*; *Sandra & Dennis Fishing Corp., supra*; *Gavagan, supra*. The rule itself is thus utterly irreconcilable with the jurisprudence of the rest of the nation – regardless of how often or seldom the discretionary function exception has been overtly mentioned in the decisions.

C. *Hurd*: Government argues discretionary function exception. In *Hurd v. United States*, *supra*, the government urged the district court to find the Coast Guard's actions (or inactions) were discretionary. The Coast Guard moved for summary judgment[4] and claimed wholesale discretion to determine when and how to respond to a distress at sea. Pet. App. 21a. The government's reliance on the discretionary function exception advocating the district court to find immunity is clear. Pet. App. 16a-21a. The district court denied the United States' third motion for summary judgment and, following a trial on the merits, entered judgment in favor of the plaintiffs.

Like *Hurd*, *Gavagan*, *DeVane*, *Huber*, *Sandra & Dennis Fishing Corp.*, and *Sagan*, the present case involves Coast Guard conduct that occurred after the decision to undertake a search and rescue mission was made. Once the rescue has begun, the Coast Guard must act with reasonable care, and, like any private party, is liable for its negligence where the victim's detrimental reliance fulfills the Good Samaritan criteria. These well-settled and controlling principles are at the heart of this Petition and merit immediate review.

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4. Pet. App. 1a-2a.

D. Coast Guard Has Achieved Wholesale Immunity: Government Tort Liability Eliminated. While Respondents virtually concede that Petitioner's have a valid cause of action and that the Petition merits review, they ask this Court to endorse the Eleventh Circuit's opinion granting the Coast Guard wholesale immunity for all Coast Guard acts, including search and rescue missions. Br. 12. Regardless of which portion of 28 U.S.C. § 2680(a) the government relies, Respondents consistently state that the Coast Guard does not have a duty to act with reasonable care during a search and rescue. Respondents want the Supreme Court to overrule its own precedent and grant blanket immunity for any and all acts during a search and rescue regardless of whether the Coast Guard's actions made the victim's condition worse. This Petition merits review to resolve the split between the First, Fourth, Fifth, Sixth, Ninth Circuits and Eleventh Circuit.

That the Coast Guard owed Petitioners a duty of care is clear under Congressional mandates, decisions of this Court, controlling decisions within the Eleventh Circuit, and numerous other circuit courts of appeals.[5]

Respondents misapprehend Petitioners' statement that the Coast Guard enjoys sovereign immunity if it chooses not to respond to a search and rescue. Suggesting that the Coast Guard cannot waive its sovereign immunity once a rescue is undertaken, directly conflicts with the plain language and purpose of the remedial statutes at issue as well as a substantial body of controlling legal precedent. The Eleventh Circuit's opinion is at odds with The Suits in Admiralty, Public Vessels Act and the Federal Tort Claims Act's discretionary function exception and distress-at-sea jurisprudence. The Respondents' attempt to characterize all Coast Guard search and rescue

5. In addition to the decisions finding the Coast Guard responsible for search and rescue negligence, the general maritime law of the United States applies "the standard of reasonable care to nearly every situation, disdaining as it often does the fine spun distinctions indigenous to the common law." *Gavagan*, 280 F.2d at 328, *citing Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959).

decisions as discretionary. However, not all discretionary decisions fall within the discretionary function exception. Only those decisions grounded in public policy are protected. *Berkovitz*, 486 U.S. at 536-37. The Coast Guard's search and rescue response (once it made the decision to undertake the rescue) does not involve public policy decisions as the the challenged conduct does not involve a permissible exercise of policy judgment:

> Moreover, assuming the challenged conduct involves an element of judgment, a court must determine whether that judgment is *of the kind* that the discretionary function was designed to shield. The basis for the discretionary function exception was Congress' desire to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in *social, economic, and political policy* through the medium of an action in tort."

Id. There are no concerns of judicial "second guessing" or "armchair admirals" as the:

> imposition of liability, i.e. duty, will not deter performance of like search and rescue projects by the Government. The Government's vast machinery is put into operation, not out of any hope of reward, but out of a policy determination on the highest executive level that the resources of the governmental agencies should be exploited effectively to save life and property.

Gavagan, 280 F.2d at 326.

Absent Supreme Court review, the Eleventh Circuit's ruling will stand tort litigation against the government on its head as the discretionary function exception will swallow the rule of federal tort liability. This would defeat Congress' clear intent. The Supreme Court expressed great concern about this possibility in *Westfall v. Ervin*, 484 U.S. 292 (1988) decided just five months before *Berkovitz*, and itself cited in *Berkovitz*:

> If the precise conduct is not mandated by law, petitioners argue, then the act is "discretionary" and

> the official is entitled to absolute immunity from state-law tort liability. *We reject such a wooden interpretation of the discretionary function requirement.* Because virtually all official acts involve some modicum of choice, petitioners' reading of the requirement would render it essentially meaningless.

Westfall, 484 U.S. at 298 (1988) (italics added).

Perhaps the best illustration of the importance of this distinction is the classic government-driver scenario. Government drivers unavoidably possess a level of discretion about how they drive. That discretion clearly calls upon and expects them to make safety decisions. *See United States v. Gaubert*, 499 U.S. 315, 325, fn. 7 (1990). The government relies on directives that employ the word "discretion" in dealing safely with distress situations. This, it suggests, supports immunity for the government in this case. But this logic would extend the discretionary function exception to protect the government driver, whose acts have never enjoyed this protection. *See Gaubert,* 499 U.S. at 325 & fn. 7; and Scalia, J. (concurring), *id.* at 336 (1991) (driver's discretion outside scope of exception).[6] If the action of the Eleventh Circuit is affirmed, there will be no principled reason to distinguish these scenarios from each other.

The discretionary function exception will swallow the rule and eliminate government tort liability. This cannot be the law, because the actions complained of here did not call for or permit the Coast Guardsmen involved to weigh considerations of *social, economic, or political* policy. Thus, under the *Berkovitz* analysis, no protected discretion attached to the actions of the Coast Guard here. With the Coast Guard present only to "offer help," just like any other helpful mariner who might be on scene, there is simply no way that the people on scene were to take into account

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6. *See, e.g., Collazo v. United States*, 850 F.2d 1 (1st Cir. 1988) (J. Breyer) (discretionary function exception does not protect the government from suit by reason of errors in medical care on the part of a government physician).

any considerations of "social, economic, and political policy" in deciding what to do about a man with the bends. This was a simple matter of getting Mr. Lewis to oxygen and a decompression chamber, in the quickest possible way.

The Coast Guard is amenable to suit for responding to a known life-threatening, specialized rescue with an untrained and ill-equipped crew who relayed estimated times of arrival that were off by one-hundred percent each way and significantly delayed Mr. Lewis' treatment. The Coast Guard's search and rescue expertise was offered and relied upon by the Lewis vessel. Unfortunately, the facts of the instant case demonstrate that the Lewis vessel's detrimental reliance resulted in a permanent worsening of Mr. Lewis' condition.

II. GRAVITY OF COAST GUARD NEGLIGENCE.

A. Detrimental Reliance. The Coast Guard knew they were responding to a person with decompression sickness and/or air gas embolism – both life threatening injuries. (R. 29- Composite Exhibit 6: Weeks, p.107, line 21-25, p.108). Both remaining members of the Lewis vessel testified that after Mr. Lewis was transferred to the Coast Guard boat, they were going much slower than before, and could have arrived at Mayport faster if they had never transferred Mr. Lewis to the Coast Guard boat. (R. 29-Composite Ex. 14: C. Lewis, p.96, lines 1-6; Altieri, p.93, lines 21-25, p.94, lines 1-2). **Both would also testify that they believed that Mr. Lewis was receiving life saving medical care while on board the Coast Guard vessel; which was their sole reason for calling the Coast Guard.** (R. 29-Composite Ex. 15: C. Lewis, p.95, lines 5-25; Altieri, p.127, lines 15-25, p.128, lines 1-8). One crew member testified that not a single crew member was permitted to do anything to help Mr. Lewis. (R. 29-Ex. 12). **In fact, the Coast Guard Coxswain testified that even if the boat had oxygen aboard and he knew Mr. Lewis would die without oxygen, he would not administer it.** (R. 29-Composite Ex. 17: Burke, p.183, lines 20-25, p.184, lines 1-13).

The Lewis vessel only relinquished Brandon Lewis to the Coast Guard upon the well-founded belief that he would be given immediate oxygen and transported to a decompression chamber more quickly. Instead, the Coast Guard did nothing other than delay Mr. Lewis' treatment. In effect and contrary to the reasonable expectations of the Lewis vessel, the Coast Guard operated as nothing more than a water taxi, ferrying a patient with known life threatening injuries to a drop off point; where the real rescue would begin in the hands of the Life Flight crew.[7] The Eleventh Circuit's opinion destabilizes the general maritime law in creating express conflicts among the circuits through the elimination of Coast Guard responsibility in distress-at-sea cases.

B. Coast Guard District Seven Mandates Divers Alert Network Training. The Coast Guard knew as early as 1996 that the administration of oxygen to a diving decompression illness victim was essential. (R. 29-Ex. 18). The Coast Guard accepted a very generous offers from the renowned Divers Alert Network ("DAN") to train Coast Guard crewmen – free of charge – in the administration of oxygen so that they would be able to properly respond to the rescue of a "bends" victim. (R. 29-Ex. 19). This policy directive was issued to the Coast Guard station at issue. (R. 29-Ex. 21, 22, 23, & 24).

This policy was ignored at Group Mayport and culminated in the Coast Guard exercising its discretion to undertake the rescue of a known diving victim with serious life-threatening injuries. The search and rescue was performed without any regard for reasonable care and permanently worsened Mr. Lewis' injuries.

CONCLUSION

For the reasons set forth above, the Petitioners respectfully request that the petition for writ of certiorari be granted.

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7. *See Hurd v. United States*, 134 F.Supp.2d at 759 ("A Coast Guard rescue involves more than simply putting a boat in the water.")

Respectfully submitted,

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APPENDIX

APPENDIX A — UNITED STATES' THIRD MOTION FOR SUMMARY JUDGMENT AND DISMISSAL DATED MARCH 14, 2000

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA CHARLESTON DIVISION

C/A: 2:99-0240-18

C/A: 2:99-0241-18

C/A: 2:99-0242-18

C/A: 2:99-0243-18

DEIRDRE LYNN HURD, as Personal Representative of the Estate of Bobby Lee Hurd, Jr., deceased,

and

MARY E. MOORE CORNETT, as Personal. Representative of the Estates of Michael Paul Cornett, deceased, Michael Wayne Cornett, deceased, and of James Daniel Comett, deceased,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

Appendix A

UNITED STATES' THIRD MOTION FOR SUMMARY JUDGMENT AND DISMISSAL

COMES NOW defendant, United States of America, by and through undersigned counsel, and pursuant to Local Rule 7 and Rule 12(b)(6) of Federal Rules of Civil Procedure, hereby moves this honorable Court to dismiss plaintiffs complaints for failure to state a claim upon which relief can be granted and for lack of subject matter jurisdiction. Additionally, pursuant to Rule 56 of the Federal Rules of Civil Procedure, the United States moves for summary judgment because there is no genuine dispute of material fact and because the United States is entitled to judgment as a matter of law. The United States' motion is supported by the attached Memorandum of Law and exhibits thereto.

Date: March 14, 2000

Respectfully submitted,

DAVID W. OGDEN
Acting Assistant Attorney General

[additional signatories omitted]

APPENDIX B — MEMORANDUM IN SUPPORT OF THE UNITED STATES' THIRD MOTION FOR SUMMARY JUDGMENT AND DISMISSAL DATED MARCH 14, 2000

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA CHARLESTON DIVISION

C/A: 2:99-0240-18

C/A: 2:99-0241-18

C/A: 2:99-0242-18

C/A: 2:99-0243-18

DEIRDRE LYNN HURD, as Personal Representative of the Estate of Bobby Lee Hurd, Jr., deceased,

and

MARY E. MOORE CORNETT, as Personal. Representative of the Estates of Michael Paul Cornett, deceased, Michael Wayne Cornett, deceased, and of James Daniel Comett, deceased,

Plaintiffs,

vs.

UNITED STATES OF AMERICA,

Defendant.

Appendix B

MEMORANDUM IN SUPPORT OF THE UNITED STATES' THIRD MOTION FOR SUMMARY JUDGMENT AND DISMISSAL

INTRODUCTION

On the night of December 28, or early morning of December 29, 1998, the sailing vessel MORNING DEW allided with the north Charleston jetty. Michael Wayne Cornett, his two sons, James Daniel Cornett and Michael Paul Cornett, and a cousin, Bobby Lee Hurd, were aboard the vessel. There are no eye-witnesses to the accident, and no survivors. Little is known about the circumstances surrounding the allision, or the movements of the boat and its passengers afterwards. The next morning two bodies (Bobby Lee Hurd and Daniel Cornett) were found by passers-by at a beach at Sullivans Island, and a search and rescue mission was initiated.

Plaintiffs contend that the Coast Guard, acting though the pilots association, had undertaken a search and rescue mission in the early morning, before the bodies were discovered, and that the Coast Guard's negligence in conducting that search and rescue mission resulted in the deaths of the victims of the MORNING DEW tragedy.

The Government contends that the Coast Guard, as a Good Samaritan, had no duty to rescue those victims, and that it did not engage in any conduct that worsened the position of the victims of the MORNING DEW allision. While the Coast Guard relied on information provided by the pilots association in order to determine *whether* to

undertake a search and rescue mission, such reliance by the Coast Guard is not the equivalent of undertaking a search and rescue mission. As discussed in further detail below, summary judgment should be granted in favor of the United States because there is no genuine dispute of material fact and because the United States is entitled to judgment as a matter of law. Furthermore, plaintiffs' claims are subject to dismissal for failure to state a claim for which relief may be granted and for lack of subject matter jurisdiction.

FACTS

A. SUBSTANTIVE

On the morning of December 29, 1998, Petty Officer Eric Shelley was standing the telecommunications watch at the Coast Guard Station in Charleston. At 2:18 a.m., as he was getting coffee, he heard a radio transmission. [Shelley deposition, Attached as Exhibit A, page 20]. The transmission sounded, to Shelley, like a person calling the Coast Guard. [Telephone Log, Attached as Exhibit B, page 133]. Shelley heard a young person call "U.S. Coast Guard, U.S. Coast Guard," but did not hear the word mayday. [Ex. A, page 75; Ex. B, page 133]. The sound of the voice, alone, did not indicate distress. [Ex. A, page 75]. Within 13 seconds, Shelley twice attempted to make contact with the caller, and received no response. [Radio Log, Attached as Exhibit C, pages 13-14].

At 2:22 a.m., Shelley heard a static transmission. [Ex. A, page 30]. He twice attempted to make contact with the caller, advising that he was standing by, monitoring Channel 16, [Ex. C, page 13]. There was no response. *Id.*

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At 5:18 a.m., John Stuhr, who was operating the Charleston, Pilot Boat PALMETTO STATE, carried a Charleston Pilot to the auto carrier PEARL ACE, and began the voyage back to the dock, traveling in the lee of the PEARL ACE. [Stuhr Statement, Attached as Exhibit D, page 1]. Winds were blowing out of the Northeast at 25 knots, and the seas were about 5 feet. *Id.* Approximately an hour later, upon arrival at the dock, the pilot informed Stuhr that a boatswain on the inbound ship had heard someone yelling for help somewhere between buoy "22" and the beach. *Id.* The pilot asked Stuhr if he would turn around and investigate. *Id.* Within 10 minutes, Stuhr was on scene, searching for signs of persons in need of help. *Id.*

At 6:27 a.m., the Charleston pilot's office called the Coast Guard. [Ex. B, page 22]. Petty Officer Shelley took the call:

Pilots: Um, we got a pilot inbound, um, on a car carrier and he just passed 22 buoy, you know right inside the harbor.

Shelley: Uh huh, twenty, uh —

Pilots: Twenty two.

Shelley: Twenty Two. OK.

Pilots: And, uh, the boatswain on the ship radioed to the bridge that he heard somebody yelling for help and the pilot boats have gone, the pilot boat was here at the dock, they've gone back

out to look around, but the pilot wanted me to call you to let you know what was going on, like I 'said, we've got the pilot boat out there looking for somebody now.

Shelley: They weren't able to talk to them any.

Pilots: Well, no, it was somebody in the water.

Shelley: Oh, somebody in the water.

Pilots: Yeah, that's what they think.

Shelley: Oh, I see.

Pilots: Um, so the pilot boat, they were just getting up here to the dock but they just turned around and went back out to 22 to look around, what they're going to find I don't know.

Shelley: OK, how, many, which pilot boat went out there?

Pilots: CAROLINA. Excuse me, wait a minute, we had problems with the boats last night. PALMETTO STATE.

Shelley: PALMETTO STATE.

Pilots: But if I guess once they get back to 22, 1 can call you back and let you know what they see or hear but I don't even —

Shelley: OK, OK, well I'll alert the station and they'll determine if they want to get underway also.

Pilots: Oh, OK. Well I can, if you want, I can call you back once they get out there to 22 buoy and see what they find.

Shelley: OK, could you.

Pilots: Yeah, yeah.

Shelley: Alright.

Id. Shelley passed the information on to Petty Officer Hartzog[1] and Perry Officer Sass.[2] [Ex. A, page 44]. Sass checked the location of Buoy 22 on the chart, and decided that he would wait for the information from the pilot boat in order to decide whether there actually was anything out there. [Sass Deposition, Attached as Exhibit E, pages, 15, 59].

At 6:46 a.m., John Stuhr contacted the pilot office and advised that he had not seen or heard anyone. [Ex. D, Page 1]. At the pilot's request, Stuhr remained in the area until twilight, when visibility improved, and continued the search towards the cove. *Id.* He did not see any signs of people needing help. *Id.* He informed the pilot office that nothing looked peculiar, and returned to the dock at 7: 15. *Id.*

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1. Petty Officer Hartzog was the telecommunications watchstander who relieved Shelly from his watch. [Ex. A, page 38].

2. Petty Officer Sass was the Operations Duty Officer ("ODO"). [Ex. E, page 7].

Appendix B

While Stuhr was continuing his search, the pilot office called the Coast Guard. [Ex. B, pages 22-23]. Petty Officer Hartzog received the call:

Hartzog: Charleston Communications, Petty Officer Hartzog, may I help you?

Pilots: Hey, this is the Pilot Office.

Hartzog: Hey.

Pilots: I called there earlier, did I talk to you?

Hartzog: No, but I was briefed on what you said.

Pilots: Oh, OK. Well, the pilot boat's out there and they don't see anything and they haven't heard anything, so they're going to come on back. Hartzog: Alright, thanks a lot.

Pilots: Thank you

Id. There were no other communications between the pilot office and the Coast Guard regarding the pilot boat's search. *Id.*

At 11:15 a.m., the Sullivans Island police department contacted the Coast Guard to advise that a body had been discovered on the beach, and that another body had been discovered in the water. [Ex. B, pages 58-59].[3] The Sullivan's

3. These were determined to be the bodies of Bobby Hurd and Daniel Cornett. The bodies of Michael Wayne Cornett and Michael Paul Cornea were found later, in different locations.

Island police department requested the Coast Guard's assistance, and the Coast Guard indicated that it would provide assistance. *Id.* Shortly thereafter, a search and rescue mission was initiated. [Ex. E, pages 45-47].

B. PROCEDURAL

In their original complaints, plaintiffs contended that the United States was liable for failing to undertake a search for the MORNING DEW. The United States filed a motion to dismiss the complaint for failure to state a claim for which relief may be granted because the United States has no duty to rescue persons or property in distress. Plaintiffs did not file an opposition to the United States' motion. Following a hearing on the motion, the United States' motion was denied, without prejudice, and plaintiffs were directed to amend their complaints.

On or about June 23, 1999, plaintiffs filed amended complaints. In their amended complaints, plaintiffs contend that the Coast Guard, either through the use of its own resources and/or by obtaining and/or relying on the assistance of others, undertook an attempt to rescue plaintiffs' decedents. On July 10, 1999, the United States filed a motion to dismiss the amended complaints, or in the alternative, for summary judgment. In that motion, the United States contended that it had not initiated a search and rescue, and that the voluntary undertaking of the pilots association could not be considered the equivalent of an undertaking by the United States.

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Plaintiffs filed an opposition and an affidavit of counsel pursuant to Fed. R. Civ. P. 56(f). In the affidavit, plaintiffs' counsel stated that plaintiffs needed to depose seven Coast Guard witnesses before they could present the facts essential to justify plaintiffs' opposition to the United States' motion. The United States filed a supplemental memorandum in support of its motion, arguing that further discovery would be futile because the essential facts had already been established by contemporaneous records that were available to plaintiffs. The Court denied the United States' motion without prejudice, allowing plaintiffs to conduct discovery and depose those individuals identified in their Fed. R. Civ. P. 56(f) affidavit.

The seven witnesses identified by plaintiffs have all been deposed, and the parties have exchanged written discovery. While plaintiffs have been able to elicit various opinions and interpretations of the MORNING DEW tragedy, plaintiffs' discovery efforts have not resulted in any change of the basic facts. This matter is ripe for disposition.

ARGUMENT

I. SUMMARY JUDGMENT STANDARD

Federal Rule of Civil procedure 56(c) provides that summary judgment shall be rendered if there is no genuine issue as to any material fact, and if the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure

the just, speedy and inexpensive determination of every action. *Celotex v. Catrett*, 477 U.S. 317, 327 (1986). The standard of review mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986).

A party moving for summary judgment has the initial burden of supporting its motion with written discovery, affidavits or other documentary evidence, which demonstrate that there is no genuine dispute as to any material fact. *United Slates v. Four Parcels of Real Property*, 941 F.2d 1428 (11th Cir. 1991) (en banc). Once this burden is met, the non-moving party must "go beyond the pleadings" and designate specific facts supported by affidavits, depositions and/or other discovery, which demonstrate a genuine issue for trial. *Celotex*, 477 U.S. at 324; *Four Parcels*, 941 F.2d at 1438. If the non-movant's evidence is colorable or not "significantly probative", summary judgment is appropriate. *Anderson*, 477 U.S. at 249.

The evidence must be reviewed in the light most favorable to the non-moving party. *Plastique Tags, Inc. v. Asia Trans Line Inc.*, 83 F.3d 1367 (11th Cir. 1996). The mere existence of a scintilla of evidence in support of the non-movant's position, however, will be insufficient to avoid summary judgment. *Anderson*, 477 U.S. at 249. Instead, there must be evidence on which the jury could reasonably find for the non-movant. *Id.* at 252.

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As discussed in further detail below, the United States is entitled to summary judgment and dismissal of plaintiffs' complaints because there is no genuine dispute of material fact and because the United States is entitled to judgment as a matter of law. The Coast Guard has no duty to initiate a search and rescue mission (hereinafter "SAR mission"). Instead, it has discretion to determine whether, and how, to respond to a reported distress situation. Furthermore, while the Coast Guard may have relied on the information provided by the pilots association, the receipt of information is not equivalent to the Coast Guard undertaking a SAR mission, and it does not transform employees of the pilots association into agents of the Coast Guard. Any holding to the contrary would eviscerate the United States' discretion regarding the initiation of SAR missions, and would expose the United States to broad ranging liability based on the conduct of independent Good Samaritans. Finally, summary judgment should be granted in favor of the United States because the undisputed facts establish that the United States did not engage in any conduct that worsened the position of decedents.

II. THE UNITED STATES COAST GUARD, AS A GOOD SAMARITAN, HAS NO DUTY TO UNDERTAKE A SEARCH AND RESCUE MISSION

Plaintiffs' claims, once stripped of the various theories in which they have been cloaked, boil down to an allegation that the Coast Guard could have, and should have, launched assets earlier than it did, and that, had it done so, plaintiffs' decedents would have been saved. Any claims based on such theories are subject to dismissal for failure to state a claim for which relief may be granted and for lack of subject matter jurisdiction.

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Plaintiffs concede, as they must, that 14 U.S.C. §88 provides that the Coast Guard may perform acts or render aid necessary to perform rescue operations, and that this statute does not create any duty of affirmative action, even if requested.[4] *In re Weeks Dredging and Contracting Inc.*,

4. The universally accepted rule is, absent any statutory mandate or pre-existing duty, there is no duty to rescue another person in need of assistance. PROSSER AND KEETON ON TORTS § 56 at 375 (5th ed. 1984); RESTATEMENT (SECOND) OF TORTS § 314. See, also *United States v. Sandra & Dennis Fishing Corp.*, 372 F.2d 189, 195 (1st Cir. 1967) ("the applicable statutes, 46 U.S.C. §§741-752, 781-90, do not amount to a general undertaking by the United States to provide rescue service on demand."); *Lacey v. United States*, 98 F. Supp. 219, 220 (D. Mass. 1951) ("nowhere in the statute is there created a right to be rescued in the sense of an award of civil damages for the negligent failure of the Coast Guard to attempt to rescue a person in distress," and it is "not for the Court to create this right where such a novel tort liability is neither contemplated by the basic statute nor recognized by prior law."); *Kelly v. United States*, 531 F.2d 1144, 1147-8 (2d Cir. 1975) (the Coast Guard is authorized, though not obligated, to render aid to distressed persons, vessels and aircraft); *Albinder v. United States*, 703 F. Supp. 246 (S.D. N.Y. 1988) (no affirmative governmental duty to rescue a vessel in distress); *Kurowsky v. United States*, 660 F. Sup. 442, 450 (S.D. N.Y. 1986) ("There is no affirmative duty on the part of the Coast Guard to rescue or furnish assistance to a vessel or individual in distress. The decision to undertake a rescue is discretionary with the Coast Guard."), *Frank v. United States*, 250 F.2d 178 (3rd Cir. 1957) (legislation authorizing the Coast Guard to establish and operate rescue facilities and render aid to persons and property, falls short of creating a governmental duty of affirmative action owed to a person or vessel in distress); *Hood v. United States*, 695 F. Supp. 237, 242 (E.D. La. 1988) ("there is no affirmative duty on the part of the Coast Guard to rescue or furnish assistance to a vessel in distress");

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et. al., 1975 A.M.C. 1189 (E.D. Va. 1975), In short, the Coast Guard acts as a Good Samaritan in this area. Accordingly, courts have consistently recognized that the Coast Guard, like any private party, has no affirmative duty to undertake a rescue. *Korpi v. United States*, 961 F. Supp. 1335, 1346 (N.D, Cal. 1997) (citing cases), *aff'd*, 145 F.3d 1338 (9th Cir. 1998); *McLaughlin v. United States*, 671 F. Supp. 72, 74-75 (D. Me. 1987); *Daley v. United States*, 499 F. Supp. 1005, 1049 (D. Mass. 1980) (Aldrich, S.C.J.) (citing cases); *see*, *Frank v. United States*, 250 F.2d 178, 180 (3rd Cir. 1957), *cert. denied*, 356 U.S. 962 (1958); *see*, *also*, *Lacey v. United States*, 98 F. Supp. 219, 220 (D. Mass. 1951) ("It is well settled common law that a mere bystander incurs no liability where he fails to take any action, however, negligently or even intentionally, to rescue another in distress"). Any decision to provide assistance is purely discretionary, *Foltting v. United States*, 324 F. Supp. 585, 587 (S.D. Tex. 1971), and not subject to judicial review, *McLaughlin v. United States*, 671 F. Supp. at 75, because "Congress, in its legislation and its appropriations, not the courts, sets the limits of the Coast Guard's obligations," *Daley*, 499 F. Supp. at 1009, and

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Korpi v. United States, 961 F. Supp. 1335 (N.D. Cal. 1997) ("the Coast Guard has no affirmative duty to render aid to a vessel or person in distress"); In re CGC POINT JUDITH, 1989 A.M.C. 2367 (C.D. Cal. 1987) (Coast Guard has no affirmative duty to rescue a vessel or person in distress); *Wright v. United States*, 700 F. Supp. 490 (N.D. Cal. 1988) (same); *Shupe v. United States*, 1979 A.M.C. 2282 (C.D. Cal. 1979) (same); *Bunting v. United States*, 662 F. Supp. 971 (D. Alaska 1987); *DFDS Seacruises v. United States*, 676 F. Supp. 1193, 1200 (S.D. Fla. 1987) (the Coast Guard does not have a mandatory duty to provide rescue or salvage services); *Mazullo v. United States*, 1980 A.M.C. 1038 (D. D.C. 1979).

Congress has specifically provided that "the Coast Guard may perform any and all acts necessary to rescue and aid persons and protect and save property." 14 U.S.C. § 88(a)(1) (emphasis added); *see*, *Fernandez v. Brock*, 840 F.2d 622, 632 (9th Cir. 1988) ("may" is permissive). If Congress intended to charge the Coast Guard with a mandatory duty to rescue persons in distress, it would have done so as it has in other maritime contexts. *See*, *e.g.*, 46 U.S.C. § 2303(1) ("a master . . . of a vessel involved in a marine casualty shall render necessary assistance . . .") (emphasis added).

Even after discovery, this case remains very similar to *Daley v. United States*, 499 F. Supp. 1005 (D. Mass. 1980). In *Daley*, a group of four adults went fishing in Scituate Harbor. *Id.* at 1007. Their motorboat capsized, casting the four occupants into the water. *Id.* After darkness had fallen, a relative of the boat owner contacted the Coast Guard and advised that the fishing party had not returned, and that they never returned after dark. *Id.* The Coast Guard instituted a PRECOM.[5] *Id.* at 1008. By midnight, with the PRECOM still incomplete, a friend of one of the individuals aboard the boat falsely advised the Coast Guard that one of the boat occupants was pregnant, that the boating party had been drinking, and that they were inexperienced boaters. *Id.* The Coast Guard manned its ready boat and commenced a search. *Id.* Two survivors of the accident were found the next morning. *Id.* at 1009.

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5. A PRECOM is an inquiry of all harbor masters, etc., in the area to learn if the boat might have landed or been heard of elsewhere. 499 F. Supp. at 1008.

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The wife of one of the two decedents brought suit against the Coast Guard, alleging that the Coast Guard should have initiated a search much earlier. *Id.* The District Court rejected this claim, explaining that "**there is no affirmative duty on the Coast Guard to institute a search, even if a court would have considered its refusal unreasonable**." *Id.* (emphasis added). The Court also rejected plaintiffs argument that the PRECOM was an initial step in a SAR mission, and that, having issued the PRECOM, the Coast Guard had undertaken a rescue and was under a duty to conduct that mission with reasonable care. *Id.* Characterizing the argument as a misconception and an overstatement, the Court explained that:

> [O]ne undertaking does not necessarily require another . . . The purpose of the PRECOM is to assist in determining whether to do anything further. Absent some promise or affirmative representation, of which there was none here, instituting a PRECOM commits the Coast Guard to nothing. Failure to follow it up is not comparable to abandoning a search that is already underway.

Id. See, also, Hood v. United States, 695 F. Supp. 237 (E.D. La. 1988) (Coast Guard had undertaken rescue of personnel aboard a sinking ship, but had not undertaken salvage of the ship). Plaintiffs make the same argument in this case, contending that the Coast Guard "commenced" a SAR mission when it consulted the chart in order to confirm the location of buoy 22 and/or received the information that had been provided by the pilots' office. There can be no doubt that the Coast Guard gathers information in order to decide

whether, and how, to conduct a SAR mission. Indeed, several Coast Guard witnesses have testified that the gathering of information is an initial step in a SAR mission [Ex. E, pages 60-62; Brown Deposition, Attached as Exhibit F, pages 16-18; Saunders Deposition, Attached as Exhibit G, pages 55-56]. It would be folly to suggest that the Coast Guard does not obtain, and often rely on, the reports of third parties in collecting information to be employed in the decision-making process of whether, and how, to conduct a SAR mission. This gathering and evaluation of information, however, is not the equivalent of an undertaking to launch assets in order to conduct a SAR mission.

As explained in *Daley*, absent affirmative misrepresentation,[6] one undertaking does not require another. *Daley*, 499 F. Supp. at 1009, As in *Daley*, the Coast Guard must be allowed to gather and evaluate information in order to determine whether it will initiate a SAR mission. Any holding to the contrary — i.e., that the Coast Guard is deemed to have "initiated" a SAR mission upon receipt of information regarding a reported distress and by checking a chart — would undermine the Coast Guard's discretion to determine whether it will initiate a SAR mission. In essence, such a holding would tell the Coast Guard: "if you are aware of a reported distress situation, you must immediately launch assets." The law governing the conduct of private parties, and the conduct of the Coast Guard, clearly does not impose such a

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6. Without question, there was no affirmative misrepresentation _____ advised the pilots office that he would notify the station, and ____ to get underway also. [Ex. B, page 22] (emphasis added). ____ F.2d 398 (9th Cir. 1988), the Coast Guard did not promise a ____.

duty. Instead, as discussed below, the Coast Guard has — and must retain — discretion to decide when and how to respond to reported distress situations.

McLaughlin v. United States, 671 F. Sup. 72 (D. ME 1987), is also similar. In *McLaughlin*, a citizen contacted the Coast Guard and advised that she could see a canoeist who was attempting to return to shore, but could not do so because of the wind and current. *Id.* at 74. The citizen also informed the Coast Guard that the canoeist was alone and without a lifejacket. *Id.* Small craft advisories were in effect. *Id.* The Coast Guard called the citizen 35 minutes later to inquire about the status of the canoeist. *Id.* The citizen reported that the canoeist was about an hour offshore, the water was whitecapping, there were no other boats or ships in the area, and that she would soon be losing sight of the canoeist. *Id.* The Coast Guard did not launch a SAR mission until 8:50 p.m., after the canoeist's wife advised that her husband had not returned from a fishing trip. *Id.* The SAR mission was unsuccessful. *Id.*

The decedent's wife sued the Coast Guard, alleging that because the officer who had taken the initial reports had "negligently, recklessly, and carelessly concluded that the decedent was not in any danger," the Coast Guard had failed to properly respond to the distress call. *Id.* Citing *Daley v United Status*, *supra*, the District Court dismissed the complaint based on the "well established principle that the Coast Guard is under no obligation to initiate search or rescue activity, and that a failure to do so is not subject to evaluation by a court for reasonableness." *Id.* at 75.

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Plaintiffs are making the same allegations in this case. They contend that the Coast Guard should have perceived the severity of the situation that decedents were in, and should have responded differently. Regardless of where plaintiffs choose to focus the bright light of hindsight, it is clear that their claims boil down to an assertion that the Coast Guard could have saved decedents if had taken, the proper actions — i.e., launched SAR assets — in response to the information that the Coast Guard had received, or in response to information that the Coast Guard could have obtained. As in *McLaughlin* and *Daley*, these claims are subject to dismissal because there can be no liability premised on the theory that the Coast Guard should have responded to the information differently, or sooner. See, also *Frank v. United States*, 250 F.2d 178 (3d Cir. 1957) (dismissing claim based on theory that the Coast Guard was negligent in failing to get help to the decedent before he drowned).

Without question, the decision to undertake a rescue is discretionary with the Coast Guard.[7] *Kurowsky v. United States*, 660 F. Supp. 442, 450 (S.D. N.Y. 1986). See, also, *Wellington Transportation v. United States*, 481 F.2d 108,

7. By fashioning an exception for discretionary governmental functions, Congress took steps to protect the Government from liability that would seriously handicap discretionary government operations. *United States v. S.A. Empressa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984). Accordingly, courts lack subject matter jurisdiction over complaints challenging discretionary functions of the government. See, e.g., *Hughes v. United States*, 110 F.3d 765 (11th Cir. 1997). The discretionary function exception, which is set forth in the Federal Tort Claims Act, also applies to claims brought pursuant to the Suits in Admiralty Act. *Tiffany v. United States*, 931 F.2d 271, 277 (4th Cir. 1991).

110-11 (6th Cir. 1973); *United States v. Gavagan*, 280 F.2d 319, 328 (5th Cir. 1960), *cert. denied*, 364 U.S. 933 (1961); *United States v. DeVane*, 306 F.2d 182 (5th Cir. 1962); *In re American Oil Co. and the AMOCO VIRGINIA*, 417 F.2d 164, 168 (5th Cir. 1969); *Wright v. P.J. St. Pierre Marine*, 1990 A.M.C. 325 (S.D. Tex. 1989) ("decisions regarding the allocation of scarce resources, the training of personnel, the equipping of vessels, whether to render assistance, search and rescue policies and procedures, the method of response, and the provision of a mechanism for access to historical data on casualties are all discretionary in nature and shielded from tort liability"); *Hood v. United States*, 695 F. Supp. 237, 242 (E.D. La. 1988) (the decision of whether or not to undertake a rescue or salvage is discretionary with the Coast Guard); *In re CGC POINT JUDITH*, 1989 A.M.C. 2367 (C.D. Cal. 1987) ("the decision by the Coast Guard to provide assistance is purely discretionary"). Furthermore, the Coast Guard has discretion to decide that it will await further information from the pilots association in order to determine whether it will launch a SAR mission. Any holding to the contrary would be equivalent to a holding that the Coast Guard is required to activate assets and commence a SAR mission upon being notified of a possible distress situation. Congress, when it authorized the Coast Guard's search and rescue program, did not intend such a result, and the case law uniformly holds that the Coast Guard has discretion to determine whether and how to respond to distress situations. Accordingly, to the extent that plaintiffs challenge the Coast Guard's decision making process regarding the initiation of a SAR mission, including the Coast Guard's method of gathering and evaluating information, plaintiffs' claims are subject to dismissal for lack of subject matter jurisdiction.

III. THE CHARLESTON HARBOR PILOTS WERE NOT AGENTS OF THE UNITED STATES COAST GUARD

Plaintiffs contend that pilots association was acting on behalf of the Coast Guard, and/or that the Coast Guard acted through the pilots association when the pilots office reported that they were investigating a reported call for help. Plaintiffs' argument, while creative, is nothing more than an attempt to circumvent the well established precedent that the Coast Guard — like any private party — has no duty to rescue. As discussed below, neither the facts nor the law support plaintiffs' position.

According to the Restatement (Second) of Agency, an agency relationship is "the fiduciary relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *Servis v. Hiller Systems, et. al.*, 54 F.3d 203, 207 (4th Cir. 1995). For purposes of the SAA, a primary factor in determining agency status is the degree of operational control exercised by the United States. *Id.* at 208. See, also, *United States v. Orleans*, 425 U.S. 807 (1976) ("the critical element in distinguishing an agency from a contractor is the Government's power to control the detailed physical performance of the contractor."); *Leone v. United States*, 910 F.2d 46, 50 (2d Cir. 1990) (the question is not whether a contractor must comply with federal regulations and apply federal standards, but whether its day-to-day operations are supervised by the Federal Government).

In this case, the contemporaneous record establishes that the United States exercised no operational control over the pilots association. All the Coast Guard did was receive the information the pilots provided. The pilots' decision to investigate a report that a call for help had been heard in the water was made independently by the pilots, without any input from the Coast Guard. Indeed, the pilots called the Coast Guard to make them aware of the situation after they had already sent a pilot boat to the area between the beach and buoy 22.

When the Coast Guard was made aware of the pilots' activity, it did not make any attempt to control or otherwise direct that effort. The contemporaneous, and exclusive record, of the communications between the pilots and the Coat Guard unequivocally establishes that the Coast Guard did not make any suggestions to the pilots regarding the scope of the search, the location, the method of searching, or the duration of the search. It was merely a receptor of the information supplied.

There is additional evidence that supports the conclusion that the Coast Guard did not exercise any operational control over the pilots. John Stuhr, the employee of the pilots association that had been asked by the pilot of the PEARL ACE to search in the area of buoy 22, reported his findings to the pilots, not the Coast Guard. Furthermore, when Stuhr reported to the pilot that he had searched and had not found anything, the pilot — not the Coast Guard — asked him to continue searching until twilight. Stuhr continued to search, returning to the dock at 7:15. After the pilot had asked Stuhr to continue searching until twilight, the pilots office advised the Coast Guard that they had not found anything, and that

they were discontinuing the search. This chronology makes it clear that the pilot association's decision to continue searching, even after initial efforts had not yielded any indication of a problem, was made independent of the Coast Guard.

Without question, the pilot association's decisions to undertake the search, how and where to search, and to continue searching until twilight, were made by the pilots association without any Coast Guard input whatsoever. There was no control of the "detailed physical performance" of the search, and there was no "day-to-day control" over the activities of the pilots association such that they could be considered, generally, agents of the United States. In sum, the pilots association was not acting for, or on behalf of, the Coast Guard.

Plaintiffs will undoubtedly argue that there was an agency relationship because the Coast Guard relied on the information that the pilots association provided. Even if the Coast Guard did rely on the information provided by the pilots association, this does not amount to an agency relationship because the Coast Guard exercised no control whatsoever over the pilots association, and because there was no manifestation of consent — by either party — that such control could be exercised. See, *Logue v. United States*, 412 U.S. 521, 531-32 (1973) (rejecting an argument that employees of a contractor should be considered agents of the United States simply because they are performing tasks that would otherwise be performed by employees of the government). Furthermore, the Coast Guard's acceptance of information by the pilots association is not the equivalent of

the initiation of a SAR, mission by the Coast Guard. *Daley*, 499 F. Supp. at 1009. Any holding to the contrary would subject the Coast Guard to virtually unlimited liability based on the conduct of independent Good Samaritans who report potential distress situations to the Coast Guard or respond independently to reported distress situations. See, *Servis v. Hiller Systems, et al.*, 54 F.3d 203, 207 (4th Cir. 1995) (refusing to find that independent third parties could be considered agents of the United States because such a finding would subject the United States to broad ranging liability). Plaintiffs' argument that the Coast Guard, acting through the pilots association, initiated a SAR, mission, and/or that the pilots association was acting as an agent of the United States, is without merit and must be rejected.

IV. THE UNITED STATES COAST GUARD DID NOT WORSEN THE POSITION OF THE VICTIMS OF THE MORNING DEW TRAGEDY

Plaintiffs contend that the United States worsened the position of decedents because "the pilot boat's response envisioned that a further Coast Guard response would be made,[8] and by the failure of the Coast Guard to have

8. Plaintiffs' assertion that the pilot association "envisioned" a further Coast Guard response is irrelevant and unsupported by the facts. The Coast Guard never represented, or implied, that it would also conduct a SAR mission. Given the content of the conversation between Petty Officer Shelley and the pilots association, any assumption by the pilots association that the Coast Guard would also respond to the scene is not reasonable — Shelley specifically told the pilots association that the Coast Guard would decide if it was going to get underway. Moreover, the record establishes that the pilots

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responded." Even if the court agrees that the United States undertook a SAR mission, either acting on its own or through the pilots, plaintiffs' claims are still subject to dismissal because the United States did not engage in any conduct that worsened the position of the plaintiffs' decedents. In short, the Coast Guard did not take any actions that deterred anyone from searching for the victims of the MORNING DEW tragedy, and it did not take any actions that placed decedents in a worse position following the sinking of the MORNING DEW. Consequently, summary judgment must be granted in favor of the United States.

Of all the branches of jurisprudence, the admiralty must be the most hospitable to the impulses of man and law to save life and limb and property, See, e.g., *Gribsby v. Coastal Marine Service of Texas, Inc.*, 412 F.2d 1011, 1021 (5th Cir. 1969), *cert. denied*, 396 U.S, 1033 (1970). Accordingly, in admiralty, a rescuer will be liable for damages only if: a) the rescuer was grossly negligent and the conduct worsened the position of the vessel or persons to be saved, *United States v. DeVane*, 306 F.2d 182 (5th Cir. 1962), b) the rescuer was reckless and wanton in the attempt to rescue which worsens the condition of the persons or property in marine peril, *Furka v. Great Lakes Dredge & Dock*, 825 F.2d 330 (4th Cir. 1987), or c) the rescuer's actions caused other would-be rescuers to cease or withhold their rescue attempts to the detriment of

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(Cont'd)
association decided to continue its search efforts until sunrise, without regard to the Coast Guard's intentions. Thus, regardless of what the pilots association "envisioned" that the Coast Guard would do, they made their own decisions regarding what they would do. They acted on their own, as Good Samaritans.

the party to be rescued. *United States v. Sandra & Dennis Fishing Corp.*, 372 F.2d 189 (1st Cir. 1967), *cert. denied*, 389 U.S. 836 (1967).[9]

In this case, the Coast Guard did not take any action that worsened the position of the decedents. The MORNING

9. See, also, *Albinder v. United States*, 703 F. Supp. 246 (S.D. N.Y. 1988) (the Coast Guard is subject to liability only when it causes the parties being rescued to detrimentally rely on the Coast Guard's efforts, or when its failure to exercise due care otherwise increases the risk of harm); *Patentas v. United States*, 687 F.2d 707, 717 (3rd Cir. 1982); *Kurowsky v. United States*, 660 F. Supp. 442, 450 (S.D. N.Y. 1986); *Wellington Transportation Co. v United States*, 481 F.2d 108, 111 (6th Cir. 1973); *United States v. Devane*, 306 F.2d 182, 186 (5th Cir. 1962); *Miller v. United States*, 614 F. Supp. 948, 954 (D. Me. 1985); *Frank v. Unites States*, 250 F.2d 178 (3rd Cir. 1957); *Hood v. United States*, 695 F. Supp. 237 (E.D. La. 1988) (noting that the Coast Guard had not made any affirmative representations that it would provide a service that it ultimately did not provide); *Berg v. Chevron, U.S.A.*, 759 F.2d 1425, 1430 (9th Cir. 1985) (a rescuer will be held liable only (1) for negligent conduct that worsens the position of the victim or (2) for reckless and wanton conduct in performing the rescue); *Korpi v. United States*, 961 F. Supp. 1335, 1347 (S.D. Cal. 1997) (the standard of care applicable in rescues undertaken at sea is that the rescuer will be liable for damage only (1) for negligent conduct that worsens the position of the victim, or (2) reckless and wanton conduct in performing the rescue); *Wright v. United States*, 700 F. Supp. 490, 494 (N.D. Cal. 1988) ("a rescuer will be liable for damages only if (1) it was negligent and its conduct worsened the position of the vessel to be saved; or (2) it was reckless and wanton in its attempt to rescue the vessel"); *DFDS Seacruises v. United States*, 676 F. Supp. 1193, 1201 (S.D. Fla. 1957) (the Coast Guard is liable only if (1) it was grossly negligent or reckless in its attempt to save the SCANDANAVIAN SEA, or (2) it was negligent and worsened the condition of the ship).

DEW would have sank whether or not the Coast Guard responded. Unlike *Sandra & Dennis*, 372 F.2d at 190 (the Coast Guard dragged plaintiffs' fishing vessel over a shoal, causing it to sink), the decedents in this case were not exposed to any increased risk as a result of the Coast Guard's conduct. See, *Patentas v. United States*, 687 F.2d 707, 717 (3rd Cir. 1982) (''increased risk" means some physical change to the environment or some other material alteration of the circumstances). See, also, *Rodrigue v. United States*, 788 F. Supp. 49, 52 (D. Mass. 1991) (finding that there had been no increased risk because the Air Force did not change the conditions of the water, limit the decedent's ability to reach shore, or prevent others from attempting rescues); *Oxman v United States*, 1994 A.M.C. 501 (D. OR 1993) (the Coast Guard had not worsened the claimants' position — the vessel would have sunk whether or not the Coast Guard attempted a rescue); *Mazullo v. United States*, 1980 A.M.C. 1038 (D. DC 1979) (finding that Coast Guard's failure to respond to mayday call did not worsen position of decedents). Without question, the Coast Guard did not cause the MORNING DEW to sink, and it did not take any action that changed the environmental conditions faced by its victims on the night in question.

The contemporaneous record also establishes that the Coast Guard did not worsen decedents' position by preventing rescue efforts by other parties, or by causing third parties to cease, or limit the scope of, ongoing rescue efforts. The Coast Guard did not represent that it would launch assets, get underway, or otherwise attempt rescue until sometime after 11:00, when it was notified that bodies had been discovered. As discussed above, the Coast Guard did not make any

statement that could have lead the pilots association, or any other potential rescuer, to limit, cease, or not commence search efforts. Instead, the Coast Guardsman who received the call from the pilots association advised that the information would be passed on to the station, and that they would decide IF they were going to get underway also. Moreover, although the pilots office advised the Coast Guard that they had found nothing and were going to stop looking, the pilot aboard the PEARL ACE asked the operator of the PALMETTO STATE to continue searching until daylight. The contemporaneous record establishes that the decision to continue searching was made independently, without any Coast Guard input. Given these facts, there was no reliance on the Coast Guard by the pilots. Instead, they made their own determination, based on the information they had, and the resources they had in the area, to continue searching. See *Mazullo*, 1980 A.M.C. at 1048 (observing that the SILBA and WASA, which had transmitted mayday messages received by the SEA BOY, were not diverted, nor were any rescue operations on their part thwarted, by the Coast Guard). This is certainly not a case where the Coast Guard worsened the position of the decedents by causing would-be rescuers to rest on their oars or, cease their rescue attempts. See *Lacey v. United States*, 98 F. Supp, 219, 220 (D. Mass. 1951) (dismissing plaintiffs complaint because there was no showing that the Coast Guard's rescue attempt reached the stage where other would-be rescuers were induced to cease their efforts in the belief that the Coast Guard had the situation in hand).

Furthermore, there can be no claim based on the theory that the decedents themselves acted in reliance on any

promise or representation by the Coast Guard because two-way communications between the MORNING DEW and the Coast Guard were never established. See, e.g., *In re CGC POINT JUDITH*, 1989 A.M.C. 2367 (C.D. Ca. 1987) (finding that the decedent did not act in reliance upon the Coast Guard since radio communications were never established); *Mazullo v. United States*, 1980 A.M.C. 1038 (D. DC 1979) (because the Coast Guard had not succeeded in making direct communications with the SEA BOY, no representations were ever made to the SEA BOY's passengers concerning any rescue efforts to be undertaken by the Coast Guard).

The indisputable facts of this case establish that the Coast Guard did not engage in any conduct that worsened the position of decedents. Accordingly, summary judgment should be granted in favor of the United States.

CONCLUSION

For the above stated reasons, summary judgment should be granted in favor of the United States and plaintiffs' complaints should be dismissed.

Date: March 14, 2000

Respectfully submitted,

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